

Rules of Appellate Procedure or other applicable statute. *Bowles v. Russell*, 551 U.S. 205, 211-213 (2007).

Mr. Escoffier filed his appeal late, and he is not entitled to benefit from the prison mailbox rule. Mr. Escoffier was an inmate represented by counsel when he filed his notice of appeal. As a result, he is not entitled to benefit from the prison mailbox rule. Even if this Court disagrees, Mr. Escoffier failed to comply with the requirements of the prison mailbox rule and thus still cannot benefit from it.

**A. Mr. Escoffier was Represented by Counsel, Despite a Temporary Incapacitation.**

In extraordinary cases, a litigant who is nominally represented by counsel may be treated as *pro se*. *Maples*, 565 U.S. at 289. However, *Maples* is truly an extraordinary case: both of the attorneys working with the litigant in *Maples* had accepted new jobs at different organizations and had failed to remove themselves from the matter. *Id.* Moreover, opposing counsel treated *Maples* as a *pro se* litigant and interacted with him directly, in a fashion that would be inappropriate with a represented party under the relevant law. *Id.* at 287. *Maples* had been “abandoned by counsel”, and the Court saw fit to treat him as *pro se*, which was crucial in allowing him to file an appeal to his capital sentence. *Id.* at n. 12.

Mr. Escoffier is not Mr. *Maples*. Mr. Escoffier’s case bears much more similarity to the plaintiff in *Gibbons*, 317 F.3d at 854. In that case, adjudicated under Fed. R. App. P. 4(a)(5), the plaintiff’s attorney was on vacation for more than a month after a dismissal was ordered. *Id.* She returned from vacation feeling ill. *Id.* She made no effort to advance the matter during the following month, after which

she was informed by another attorney that the deadline for appeal had already passed. *Id.* The Eighth Circuit held that “the fact that counsel became ill does not excuse the period of time when she was not ill.” *Id.* The same can be said for Mr. Escoffier’s counsel, who was healthy for at least some portion of the period between February 1 and March 2, 2021. R. at 6. Mr. Escoffier was able to speak with an attorney from his counsel’s firm on March 2 and received instructions on what to do, a privilege unavailable to the plaintiff in *Gibbons*. R. at 7.

The greatest dissimilarity between the plaintiff in *Gibbons* and Mr. Escoffier is that plaintiff’s counsel in *Gibbons* was a sole practitioner who did not have any support staff or other employees. *Gibbons*, 317 F.3d at 854. Mr. Escoffier’s counsel was a partner at a firm with 25 attorneys and 40 other employees. R. at 5. Thus, the rationale behind denying the appeal in *Gibbons* is even stronger in Mr. Escoffier’s case. Filing a notice of appeal is a simple enough task that multiple circuit courts have refused to grant extensions due to unavailability of counsel where counsel was part of a larger organization. *See, e.g., Meza*, 683 F.2d at 615.

*Maples*, *Gibbons*, and *Meza* all take place in the context of excusable neglect, and only *Maples* entertains the idea that a litigant could become *pro se* without counsel actively removing themselves from the litigation. *Maples*, 565 U.S. at 289.

Indisputably, Mr. Escoffier is represented by counsel. This Court has only ever considered a litigant to have constructively lost the representation of counsel in the context of abandonment or willful neglect. *See Maples*, 565 U.S. at 289; *see Holland v. Florida*, 560 U.S. 361, 659 (2010). No such extraordinary circumstance is

present here. But for the intervention of an attorney at Forme Curry, Mr. Escoffier likely would not have known about the deadline for appeal. It would be patently unfair to unrepresented inmates to allow Mr. Escoffier to enjoy the privileges and deference extended to *pro se* litigants while also profiting from the advice of counsel. This Court should hold that at no point did Mr. Escoffier become a *pro se* litigant or otherwise lose the assistance of counsel.

**B. Inmates Represented by Counsel Cannot Benefit from the Prison Mailbox Rule.**

The Court in *Houston* was explicitly addressing the issue of *pro se* inmates, and much of the rationale for the decision is based in their unique plight. *Houston*, 487 U.S. at 271 ([u]nlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped “filed” . . . the *pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities . . .”). Those circuits which have expanded the prison mailbox rule to represented inmates, including the court below, rely less on *Houston* and more on its codification in the Federal Rules of Appellate Procedure. *See, e.g., Craig*, 368 F.3d at 740 (citing FED. R. APP. P. 4(c)). As *Craig* notes, the words “*pro se*” and “unrepresented” are absent from the text of Fed. R. App. P. 4. *Id.* However, the advisory committee’s notes are explicit: “In *Houston v. Lack*, the Supreme Court held that a *pro se* prisoner’s notice of appeal is “filed” at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision.” FED. R. APP. P. 4(c) advisory committee’s note to 1993 amendment. There is nothing to suggest that Congress or the advisory committee ever contemplated or intended the

prison mailbox rule to apply to represented inmates. *Id.* Fed. R. App. P. 4(c) is a codification of *Houston* and cannot be read as an expansion of that case. To date, this Court has refused to expand *Houston*, most recently in denying certiorari in *Cretacci*, 2021 U.S. LEXIS 5267.

This Court has consistently shown deference to *pro se* litigants because of their unique situation. *See, e.g., Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). *Pro se* litigants are held to “less stringent standards” than those represented by counsel. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). But this Court has never extended the same deference to inmates represented by counsel. The challenges noted in *Houston*, which moved the Court to create the prison mailbox rule, do not apply to Mr. Escoffier and other represented inmates. *Houston*, 487 U.S. at 271 (enumerating roadblocks to *pro se* inmate compliance with deadlines). The situation of the represented inmate is much more akin to any other represented litigant than it is to a *pro se* inmate.

A comparison to *Craig* is useful in illustrating how Mr. Escoffier enjoyed unique privileges foreign to the *pro se* inmate protected by *Houston*, 487 U.S. at 269. *Craig* is alien to Mr. Escoffier’s case because the appellant therein told his attorney that he had no intention of appeal and never contacted his attorney to assist in the filing of the appeal. *Id.* By contrast, Mr. Escoffier requested and was assured the assistance of counsel after the unfavorable decision at the trial level. R. at 6. The inmate in *Craig, id.*, was acting of his own accord without guidance, and thus faced the same hurdles that drove the Court’s reasoning in *Houston*, 487 U.S.

at 271. Mr. Escoffier had the assistance of counsel, including a conversation with an attorney at Forme Curry the same day that he filed his appeal. R. at 7. Whereas the inmate in *Craig* only made use of the prison mailbox rule, Mr. Escoffier attempted to make use of the prison mailbox rule as well as the assistance of counsel. While Mr. Escoffier's ability to co-ordinate with counsel was reduced, he still had multiple conversations with attorneys at the firm that represented him during the period for appeal.

Mr. Escoffier's case is also distinct from *Moore*, 24 F.3d at 624. In *Moore*, the Fourth Circuit explicitly expanded the prison mailbox rule in the criminal context. *Id.* at 626. To date, the Fourth Circuit has never applied its expanded reading of *Houston* to the civil context. Thus, *Moore* cannot justify Mr. Escoffier's late appeal.

The case most factually similar to Mr. Escoffier's appeal is *Cretacci*, 988 F.3d at 860. Both cases involve a civil matter, a litigant at least nominally represented by counsel, and a filing by an inmate. *Id.* In *Cretacci*, the litigant was advised to file using the prison's mail system by an attorney. *Id.* The same occurred here. R. at 7. For the court in *Cretacci*, the key factor is reliance: a *pro se* inmate litigant must make use of the prison mail system, but an inmate litigant represented by counsel enjoys all the avenues afforded to any other represented litigant. *Id.* at 867.

Concededly, the holding in *Cretacci* was reached in the context of a civil complaint, rather than a notice of appeal, and thus is not governed by Fed. R. App. P. 4. *Id.* However, *Cretacci* explicitly interprets *Houston*. *Id.* While *Cretacci* probes the context and motivations behind *Houston*, the circuit courts that have expanded

*Houston* rely on the absence of a word from the rules of procedure. *See, e.g., Moore*, 24 F.3d at 626.

Finally, a finding that an inmate represented by counsel is entitled to make use of the prison mailbox rule would allow attorneys representing inmates to file notices later than they otherwise could by handing a notice to the inmate and directing them to send it in the prison mail system. This underhanded technique was the factual basis for *Cretacci*. *Cretacci*, 988 F.3d at 866. This would work patent unfairness and inefficiency into the adversarial system, despite lacking all of the virtues of the prison mailbox rule as applied to *pro se* inmates.

Allowing Mr. Escoffier to proceed with his appeal would set a troubling precedent. It would undercut every noble objective underlying *Houston*. It would adulterate the judicial instinct to show grace to *pro se* litigants by allowing attorneys to exploit that goodwill. This Court should find that inmates represented by counsel may not benefit from the prison mailbox rule.

Without the benefit of the prison mailbox rule, the lateness of Mr. Escoffier's notice of appeal cannot be excused. As a result, the federal appellate courts lack subject-matter jurisdiction to hear his appeal. *See Bowles*, 551 U.S. at 211-213.

**C. Mr. Escoffier Failed to Comply with the Prison Mailbox Rule.**

Even if this Court finds that Mr. Escoffier was entitled to benefit from the prison mailbox rule, he failed to comply with that rule. Accordingly, this Court should find that his notice of appeal was filed late and that the court below lacked subject-matter jurisdiction to consider his appeal.

A notice of appeal filed by an inmate must be deposited in the institution's mail system on or before the last day for filing. FED. R. APP. P. 4(c)(1). Such notice must be accompanied either by a declaration in compliance with 28 U.S.C. § 1746 (or a notarized statement) asserting the date of deposit and the prepayment of first-class postage or, alternatively, evidence showing that the notice was so deposited and that postage was prepaid. FED. R. APP. P. 4(c)(1)(A). The federal courts of appeal do not have subject-matter jurisdiction over appeals not filed before the deadline prescribed by law. *Bowles*, 551 U.S. at 211-213. The burden of proof for subject-matter jurisdiction rests with the party claiming such jurisdiction. *Kokkonen*, 511 U.S. at 377. At least one circuit court has explicitly interpreted the progeny of *Kokkonen* to imply that an inmate has the burden of proving that their filing comports with Fed. R. App. P. 4(c)(1). *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004), *cert. denied*, 543 U.S. 1005 (2004). No circuit court has found the contrary. Mr. Escoffier's filing does not meet either of the two standards in Fed. R. App. P. 4(c)(1). He thus failed to comply with the prison mailbox rule, meaning his notice of appeal was filed late and the federal appellate courts lack subject-matter jurisdiction to hear his appeal.

There is no declaration regarding the mailing date of Mr. Escoffier's notice of appeal in the record. The court of appeals, at its discretion, may accept such a declaration at a later time; however, to date, Mr. Escoffier has submitted no such declaration. FED. R. APP. P. 4(c)(1)(B).

The mailing certificate does not indicate whether or not the prison had a separate legal mail system. *Id.* It provides an opportunity to designate a piece of mail as “legal mail”, R. at App’x. F, but if a separate legal mail system exists and Mr. Escoffier failed to use it, then he is not entitled to benefit from the prison mailbox rule. FED. R. APP. P. 4(c)(1)(A)(i). The Tenth Circuit has held that an inmate who makes no statement as to the existence of a legal mail system cannot make use of the prison mailbox rule. *Sweets v. Martin*, 625 F. App’x 362, 364 (10th Cir. 2015). This Court should adopt the Tenth Circuit’s ruling and find that, because Mr. Escoffier offered no proof as to the existence of a legal mail system, he has failed to satisfy his burden to prove subject-matter jurisdiction. *See Kokkonen*, 511 U.S. at 377.

The mailing certificate is not postmarked, nor does it indicate that a notice of appeal was deposited. R. at App’x. F. The certificate indicates that Mr. Escoffier deposited a piece of legal mail with a prison employee, James Whitbread, on March 2, 2021; however, it does not specify that the mailing contained a notice of appeal. *Id.*

Mr. Escoffier has presented no facts to demonstrate compliance with the prison mailbox rule. This Court should not allow him to proceed with an appeal while he is unable to prove subject-matter jurisdiction. To do otherwise would be to overturn *Houston*, *Kokkonen*, and *McNutt*. This Court should find that Mr. Escoffier failed to comply with the prison mailbox rule, that his notice of appeal was filed late, and that the court below lacked jurisdiction to hear his appeal.

## Applicant Details

First Name **Clarence**  
 Last Name **Roby III**  
 Citizenship Status **U. S. Citizen**  
 Email Address [croby@tulane.edu](mailto:croby@tulane.edu)  
 Address

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**City**  
**New Orleans**  
**State/Territory**  
**Louisiana**  
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**70131**  
**Country**  
**United States**

Contact Phone Number **5048108249**

## Applicant Education

BA/BS From **Howard University**  
 Date of BA/BS **May 2014**  
 JD/LLB From **Tulane University Law School**  
[http://www.nalplawsonline.org/ndlsdir\\_search\\_results.asp?lscd=71904&yr=2011](http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=71904&yr=2011)  
 Date of JD/LLB **May 23, 2023**  
 Class Rank **Below 50%**  
 Does the law school have a Law Review/Journal? **Yes**  
 Law Review/Journal **No**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **BLSA Appellate**

## Bar Admission

## Prior Judicial Experience

Judicial  
Internships/        **Yes**  
Externships  
Post-graduate  
Judicial Law        **No**  
Clerk

## Specialized Work Experience

Specialized Work  
Experience        **Appellate**

## Recommenders

Griffin, Justice Piper  
pgriffin@lasc.org  
(504) 310-2352  
Peters, Darleene  
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Meyer, David  
meyer@tulane.edu

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**



CLARENCE “TREY” ROBY, III  
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**Re: Clerkship 2023**

Dear Judge Matsumoto:

I wanted to express my interest in a judicial law clerk position for 2023. I am particularly interested in working for you because of your commitment to public service.

My aim has always been to develop into an attorney dedicated to written and oral advocacy. As a member of the Tulane Law School Moot Court Program, I competed in February and March of 2022 in the National BLSA Thurgood Marshall Appellate Competition where my partner and I placed first regionally and then nationally. In the national competition, we were honored with Best Brief, and I humbly was selected as the Best Oralist besting students from Columbia, Duke, University of Virginia, and Texas A&M Law among others. Most recently, I was awarded the title as Intrascchool Appellate Champion for the Class of 2023.

Additionally, I was fortunate to coach our 2023 BLSA Appellate Team in Baton Rouge as we hoped to defend our title as Southwest Regional Champs. Not only did our team repeat as regional champs but both of our teams walked away with Best Petitioner and Respondent Briefs. My goal for the BLSA Discipline is to create a powerhouse for oral advocacy at Tulane Law. Our team also repeated at the National level in DC and took home 1<sup>st</sup> place honors.

Further, I worked as an extern for Judge Jane Triche Milazzo of the Eastern District of Louisiana which gave me the opportunity to prepare draft orders for the judge’s consideration regarding the exclusion of evidence and addressing insurance coverage involving COVID-19. I also had the opportunity to split my summer and work for Justice Piper Griffin of the Louisiana Supreme Court where my time was spent researching and writing on the retroactivity of 10-2 verdicts in criminal cases because of the U.S. Supreme Court’s ruling in *Ramos v. Louisiana*. *Ramos v. Louisiana* 404 U.S. 805, 140 S.Ct. 1390 (U.S. April 20, 2020).

This past summer I had the fortune to work as a summer associate at two of the top firms in New Orleans, Burns Charest LLP, and Irwin Fritchie Urquhart Moore & Daniels LLC. I was able to tackle complex problems such as Asbestos, Premises Liability, and Toxic Tort.

With Burns Charest, I was able to create an interactive map of an industrial power plant that was the cause of an asbestos issue in the Virgin Islands. Moreover, the bulk of my experience included dissecting and summarizing a series of depositions ranging back to 1986. Understanding the immense nuance of processing Bauxite dust and the way it turns into asbestos, created a learning curve but I was up for the challenge. Overtime, I was able to provide substantive analysis and strategy for the Virgin Island team as they prepared for trial.

At Irwin, Fritchie, Urquhart, Moore, and Daniels, I wrote a Motion for Summary Judgement for one of the firm’s equity partners. Having never written a substantive motion before it appeared a bit of a daunting task. As I worked my way through the case file and exhibits, my first assignment was difficult. However, as time went on, I fully wrapped my head about the intricacies of this complex real estate- breach of contract issue. Ultimately, I received favorable feedback from all the partners and later learned that my motion was used in the case. In addition to writing the summary judgment I was asked to research a variety of issues involving the redrawing of the congressional districts in Baton Rouge. The nuanced issue was whether the



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U.S. Supreme Court's stay in the Baton Rouge case could have a substantive impact on the *Chilsom* case pending before Judge Morgan in the Eastern District.

Before enrolling in Tulane Law, I worked in advertising in New York City and Atlanta as a digital media supervisor for six years. As a supervisor I managed budgetary allocations for client products and honed my skills in client relations.

I would welcome the opportunity to serve you as Judicial Clerk and learn from your immense knowledge in law in addition to further develop my skills in writing. I would further welcome the opportunity to further discuss my background and qualifications.

Sincerely,



Clarence "Trey" Roby, III



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## EDUCATION

**TULANE UNIVERSITY LAW SCHOOL**, New Orleans, LA  
**J.D. Candidate**

MAY 2023

**Honors:** (2023) Tulane Law Intraschool Appellate Champion, Louisiana Judicial Council Foundation Scholarship Recipient (2022) Greater New Orleans Chapter of the Louis A. Martinet Society Scholarship Recipient (2022), NBLSA Thurgood Marshall Appellate Competition National Champion (2022), NBLSA Best Oralist (2022), NBLSA Best Petitioner Brief (2022), Southwest BLSA Appellate Regional Champion (2022), Henry P. Julien Law Scholar (2020).

**Organizations:** Tulane Law Moot Court Program (2021-23), Black Law Student Association (2020-23), Sports Law Society (2020-22), Alpha Phi Alpha Fraternity, Inc., and International Fraternity of Delta Sigma Pi.

**Positions:** Tulane Law Moot Court BLSA Appellate Head Coach (2022-23), Black Law Student Association Member (2020-2023), Head Barbri Representative (2022-23), Sports Law Society Executive Board Member (2021-22), Tulane Sports Law Professional Football Negotiation Competition Board Member (2022), Tulane Professional Basketball Negotiation Competition Photographer (2022), Tulane Sports Law Society Class Rep (2020-21) & Barbri Class Representative (2020-21).

**HOWARD UNIVERSITY**, Washington, DC

**B.A. Business Administration and Marketing**

MAY 2014

**Honors:** Chrysler Case Competition Champion (2014), PepsiCo Naylor Fitzhugh Scholarship Recipient (2011), Northwestern Mutual Scholarship Recipient (2011).

## LEGAL EXPERIENCE

**IRWIN, FRITCHIE, URQUHART, MOORE, & DANIELS LLC**, New Orleans, LA JUNE 2022 - AUG. 2022  
**Summer Associate**

Drafted a motion for summary judgement for **Jane Doe v. Real Estate Company A** addressing a potential breach of contract in a real estate claim, drafted memos addressing pre-negotiation disclosures between doctors and opposing counsel, and the comparative nature of **Chisom v. Jindal** & congressional redistricting.

**BURNS CHAREST LLP.**, New Orleans, LA

MAY 2022 - JUNE 2022

**Summer Associate**

Summer Associate for the Virgin Islands Legal Team tasked with addressing issues in a variety of civil practice areas including mass tort, environmental litigation, asbestos, and construction disputes in both federal and state courts. Created interactive mapping of areas impacted by Bauxite and Asbestos contaminants.

**HONORABLE JUDGE JANE TRICHE MILAZZO**, New Orleans, LA

JULY 2021 - AUG. 2021

**Law Clerk for the United States District Court for the Eastern District of Louisiana**

Drafted order and reasons, Motion in Limine: **John Dove v. Railroad Co.** (Evidence Exclusion), **United States v. John Doe** (Argument/Evidence Exclusion), **Corporation A. v. High School and School Board** (FED R. CIV. PRO 12(b)(1)). Drafted memos in preparation for oral arguments; FED R. CIV. PRO 12(b)(1) and 12(b)(6) issues, 28 U.S.C. §1332, liability and insurance claims involving COVID-19, and forum selection clause.

**HONORABLE JUSTICE PIPER GRIFFIN**, New Orleans, LA

MAY 2021 - JUNE 2021

**Law Clerk for the Louisiana Supreme Court**

Drafted memorandums on retroactivity (10-2 verdicts in Louisiana law). Drafted memorandums for internal use: **Succession of Liner, Edwards v. Vannoy**. Assisted with legal research. Contributed to weekly meetings by dissecting key legal issues for the next set of cases for which certiorari was granted. Assisted supervising attorney by drafting and editing opinions.

NAME: Roby, Clarence M.  
STUDENT ID: 152000450  
BIRTH DAY: December 8

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COURSE NUMBER	COURSE TITLE	GRADE	HOURS (ATTEMPTED) EARNED	QUALITY POINTS	
PROFESSIONAL ACADEMIC RECORD					
2020 Fall					
ADMITTED PROGRAM:					
Law School					
Juris Doctor					
1LAW-1310	Civil Procedure	C-	4.00	6.68	
1LAW-1410	Legal Research & Writing	B	2.00	6.00	
1LAW-1110	Contracts I	C	3.00	6.00	
1LAW-1510	Torts	B	4.00	12.00	
		EHRS	QHRS	QPTS	GPA
CURRENT:		13.0	13.0	30.68	2.360
CUMULATIVE:		13.0	13.0	30.68	2.360
2021 Spring					
1LAW-1080	Constitutional Law 1	C-	4.00	6.68	
1LAW-1210	Criminal Law	D	3.00	3.00	
1LAW-1410	Legal Research & Writing	B	2.00	6.00	
1LAW-1440	Obligations I	C	3.00	6.00	
1LAW-1340	Civil Law Property	B-	4.00	10.68	
Law Cum Rank		RANK	CLASS SIZE		
		209	212		
		EHRS	QHRS	QPTS	GPA
CURRENT:		16.0	16.0	32.36	2.023
CUMULATIVE:		29.0	29.0	63.04	2.174
2021 Summer					
NCLS-9400	Summer Externship	P	3.00		
		EHRS	QHRS	QPTS	GPA
CURRENT:		3.0	0.0	0.00	0.000
CUMULATIVE:		32.0	29.0	63.04	2.174

COURSE NUMBER	COURSE TITLE	GRADE	HOURS (ATTEMPTED) EARNED	QUALITY POINTS	
2021 Fall					
NCLS-9020	Moot Court	IP	(0.00)		
2LAW-2070	Business Enterprises	P	4.00		
2LAW-2800	Legal Profession	B	3.00	9.00	
4LAW-4280	Antitrust	B	3.00	9.00	
4LAW-5410	Intellectual Property	B-	3.00	8.01	
Law Term Rank		RANK	CLASS SIZE		
Law Cum Rank		182	205		
		203	205		
		EHRS	QHRS	QPTS	GPA
CURRENT:		13.0	9.0	26.01	2.890
CUMULATIVE:		45.0	38.0	89.05	2.343
2022 Spring					
NCLS-9020	Moot Court Team	P	1.00		
4LAW-5710	Labor Law	C	3.00	6.00	
2LAW-2400	Evidence	B-	3.00	8.01	
3LAW-3490	E-Discovery & Digital	A+	2.00	8.00	
4LAW-6520	Sports Law: Antitrust & Labor	B	3.00	9.00	
4LAW-6820	Trademark & Advertising Law	A	2.00	8.00	
NCLS-9110	Seminar Work	A	1.00	4.00	
Law Term Rank		RANK	CLASS SIZE		
Law Year Rank		166	199		
Law Cum Rank		171	204		
		194	199		
		EHRS	QHRS	QPTS	GPA
CURRENT:		15.0	14.0	43.01	3.072
CUMULATIVE:		60.0	52.0	132.06	2.540
2022 Summer					
LGER-4610	Int'l Negotiation & Mediation	P	3.00		
		EHRS	QHRS	QPTS	GPA
CURRENT:		3.0	0.0	0.00	0.000
CUMULATIVE:		63.0	52.0	132.06	2.540

NAME: Roby, Clarence M.  
STUDENT ID: 152000450  
BIRTH DAY: December 8

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COURSE NUMBER	COURSE TITLE	GRADE	HOURS (ATTEMPTED) EARNED	QUALITY POINTS	COURSE NUMBER	COURSE TITLE	GRADE	HOURS (ATTEMPTED) EARNED	QUALITY POINTS
<b>2022 Fall</b>									
CLIN-5300	Juvenile Advocacy Sem	A	3.00	12.00					
CLIN-5310	Juvenile Litigation Clinic	A-	3.00	11.01					
CLIN-5550	Trial Advocacy	P	3.00						
4LAW-4080	Advanced Appellate Advocacy	A	2.00	8.00					
4LAW-4550	Con Law:14th Amendment	B	3.00	9.00					
NCLS-9020	Moot Court	IP	(0.00)						
		<b>RANK</b>	<b>CLASS SIZE</b>						
<b>Law Term Rank</b>		98	196						
<b>Law Cum Rank</b>		187	196						
	<b>EHRS</b>	<b>QHRS</b>	<b>QPTS</b>	<b>GPA</b>					
<b>CURRENT:</b>	14.0	11.0	40.01	3.637					
<b>CUMULATIVE:</b>	77.0	63.0	172.07	2.731					
<b>2023 Spring</b>									
4LAW-4950	Entertainment Law		(2.00)						
4LAW-6430	Scientific Evidence		(3.00)						
4LAW-6540	Sports Law: Int'l & IP		(3.00)						
CLIN-5310	Juvenile Advocacy Clinic		(3.00)						
NCLS-9020	Moot Court Team		(1.00)						
	<b>EHRS</b>	<b>QHRS</b>	<b>QPTS</b>	<b>GPA</b>					
<b>CURRENT:</b>									
<b>CUMULATIVE:</b>	77.0	63.0	172.07	2.731					
<b>** 148 Community Service Hours Completed **</b>									
<b>** END OF PROFESSIONAL RECORD **</b>									

\* NOT APPLIED TO CURRENT PROGRAM  
++ INCLUDES INITIAL STATISTICS

Page 2 of 2  
4/24/2023

PROFESSIONAL ACADEMIC RECORD

April 27, 2023

Kiyo Matsumoto  
United States District Court

Dear Judge Matsumoto:

I have been asked to write a recommendation letter for Clarence Roby, III and I do so without hesitation. Clarence is currently a law student at Tulane Law School, having graduated from Howard University and subsequently worked in the private sector.

While at Tulane Clarence was the first student to serve as an intern after I got elected to the Louisiana Supreme Court and thus neither he nor I knew what to expect in the relationship. I am happy to say that he set a bar that will be very difficult for those who will follow him.

I have known Clarence for all of his life as I am friends with his parents. Though his parents described him as bright and hardworking, I had never had an opportunity to see what he was capable of until he worked in my office.

His parents' description, though accurate, was no substitute for experiencing Clarence's intelligence and work ethic first hand. While interning, I found him to be both hardworking and driven. Both of his parents are members of the legal community but Clarence clearly has a goal to excel in his own right and in his own way.

Clarence originally pursued a business career and he is now poised to take the discipline and attention to details that he learned from the business world and utilize it in the legal profession. His quick grasp of complex issues and his ability to articulate those issues in a coherent fashion demonstrates strong analytical skills. Additionally, in a time when many young adults are criticized for being inwardly focused, I find Clarence to be a breath of fresh air. His concern for others and the profession demonstrates a work ethic and professionalism that is needed by new lawyers and one which he has indicated he will use to help the community. I applaud his vision and know he will be an asset wherever he chooses to serve.

Should you have any questions about the above, please do not hesitate to contact me.

Sincerely,

PIPER D. GRIFFIN  
Associate Justice  
Louisiana Supreme Court

Justice Piper Griffin - [pgriffin@lasc.org](mailto:pgriffin@lasc.org) - (504) 310-2352

Hon. Kiyo Matsumoto  
United States District Judge, Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

**RE: LETTER OF RECOMMENDATION FOR CLARENCE ROBY, III**

Dear Judge Matsumoto:

I am a Partner at the law firm of Irwin Fritchie Urquhart Moore & Daniels, LLC in New Orleans, LA, and have known Clarence Roby, III for approximately 20 years.

Throughout the time that I have known him, I have always admired and respected him. He has always been astute, and most cordial and engaging. I was excited to learn that he would be joining the ranks of this profession. I was also quite proud, but not surprised, when I learned of his activities, honors, oral advocacy awards and recognition while at Tulane's Law School. He is also a great law school ambassador.

Most recently, I had the chance to work with Clarence closely as he worked as a Summer Associate at my firm during the summer of 2022. From the beginning, Clarence demonstrated a keen sense of intuition and eagerness that would serve him well throughout his time with us. He is most engaging and also made sure to ask insightful questions. He had meaningful conversations and interactions with the firm's attorneys, as well as his fellow Summer Associates with whom he worked with this past summer.

Clarence was given a number of challenging assignments during his short tenure with us, including drafting a Motion for Summary Judgment in a state court matter pertaining to a contractual dispute. He also performed well as a deposing attorney in our mock deposition training program. Clarence was eager for all of his opportunities and approached each challenge with curiosity, maturity, and a demonstrated appreciation for the subject matters.

Not only was he poised and displayed a strong sense of confidence, he had a strong work ethic, was conscientious of his work product, and continually sought feedback on his assignments. I have no doubt that he will succeed in any path that he chooses to pursue in this profession. He most certainly will be an asset to any organization that would provide him with an opportunity to join their team.

I hope you find this information and please do not hesitate to reach out to me if you need any additional information. Thank you.

Sincerely,



Darleene D. Peters

dpeters@irwinllc.com

504-310-2235

[WRITING SAMPLE – CLARENCE ROBY, III]

**MOOT CIRCUIT COURT OF APPEAL**  
STATE OF LOUISIANA

---

NO. 2021-CA-1000

---

**BEAU MONDE,**

*Plaintiff-Appellee,*

vs.

**ANGELA ROY**

*Defendant-Appellant,*

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ON APPEAL FROM  
MOOT DISTRICT COURT  
FOR THE PARISH OF CAMBRIDGE  
HONORABLE SIMON GREENLEAF, PRESIDING

---

CIVIL PROCEEDING

---

**APPELLEE’S ORIGINAL BRIEF  
ON BEHALF OF BEAU MONDE, INC.**

---

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**Counsel of Record  
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## **STATEMENT OF JURISDICTION**

The district court had jurisdiction over this case pursuant to La. Const. Art. V, § 16. The final judgment of the Moot District Court of the Parish of Cambridge, Louisiana was entered on December 9, 2021. The Appellant was granted a suspensive appeal on December 16, 2021, in accordance with La. Code Civ. Proc. Art. 2123(A). This Court’s appellate jurisdiction is invoked under La. Code Civ. Proc. Art. 2164. Notice of Appeal was timely on January 5, 2022, and filed in accordance with La. Code Civ. Proc. Art. 2166.

## **ISSUES PRESENTED FOR REVIEW**

- I. Under La. Stat. Ann. § 23:921 of Louisiana Revised Statute, whether the overly broad provisions of the non-competition agreement are severable when the Agreement does not contain a severability clause.
- II. Under La. Stat. Ann. § 23:921 of Louisiana Revised Statute, whether a valid non-competition agreement must define the business from which the employee is prohibited from competing.

## **STATEMENT OF THE CASE**

### **A. Proceedings Below**

On November 25, 2021, Beau Monde (“Beau Monde” / “Appellee”) filed a petition for preliminary injunction against Angela Roy (“Roy” / “Appellant”) hoping to make the preliminary injunction permanent. (R. at 002-003.) On December

4, 2021, Roy appeared before the Moot District Court of Cambridge Parish asserting that a preliminary injunction should not be issued to enjoin her from competing with Beau Monde, Inc., a local salon and spa. (R. at 005.) Roy argued that the Agreement was unenforceable, and that Beau Monde failed to define the industry that the Defendant is prohibited from competing with. (R. at 008.) On December 4, 2021, the District Court preliminary enjoined Roy through November 4, 2023, from carrying on or engaging in any business like Beau Monde including but not limited to Belle Monde in the Parish of Cambridge [in Louisiana]. (R. at 021-22.) Under La. Stat. Ann. § 23:921, the lower court held that the Agreement was enforceable because it contained all requirements of a valid non-competition agreement, and the overly broad provision may be severed to cure any argument of unenforceability. (R. at 028-029.) The court's determination relied on the application of language in La. Stat. Ann. § 23:921(C) which notes that non-competition agreements may prohibit an employee from "carrying on or engaging in a business similar to that of the employer. . . .or from soliciting customers of the employer within a specified parish or parishes." La. Stat. Ann. § 23:921(C). Roy filed a motion for suspensive appeal from the preliminary injunction on December 5, 2021. (R. at 035.) On December 16, 2021, the District Court granted Roy's suspensive appeal.

**B. Statement of the Facts**

On September 30, 2017, Roy willingly agreed to refrain from (1) carrying on or engaging in any business like any other business owned by Janice Pace, the owner

of Beau Monde Inc., (2) carrying on or engaging in business like Beau Monde, Inc. in Cambridge and (3) soliciting customers of Beau Monde or any other business owned by Janice Pace. (R. at 023.) Roy was advised by Beau Monde to seek counsel prior to agreeing to the non-compete agreement. (R. at 014.) Despite the Beau Monde's recommendation, no such counsel was sought by Roy. Id. Upon signing the non-compete contract; Ms. Roy began working for Beau Monde on October 1, 2017. (R. at 023.) On November 4, 2021, Roy willfully terminated her employment with Beau Monde, Inc. Id. In violation of the Agreement, on November 21, 2021, Ms. Roy decided to open Belle Monde, a similar salon to Beau Monde in Cambridge Parish. (R. at 024.) Roy's business is also located four blocks from Beau Monde. (R. at 016.) The court held that the Agreement was enforceable, and that Roy's actions were in violation of La. Stat. Ann. § 23:921(C). (R. at 031.)

### SUMMARY OF THE ARGUMENT

Despite the Appellant's assertions, Louisiana courts have employed a strict construction of non-competition agreements. Causin, L.L.C. v. Pace Safety Consultants, LLC, 2018-0706 (La. App. 4 Cir. 1/30/19), writ denied, 2019-0466 (La. 5/20/19), 271 So. 3d 203 (citing SWAT 24 Shreveport Bossier, Inc. v. Bond, 00-1695, pp. 4-5 (La. 6/29/01), 808 So.2d 294, 298. An agreement must contain (1) the geographic location in which the restriction applies and (2) the length of time of the restriction at a maximum of two years from the date of termination. Petroleum

Helicopters. Inc. v. Untereker. 98-1816, (La. App. 3 Cir. 3/31/99), 731 So.2d 965,967, writ denied. 99-1739 (La. 8/5/99), 747 So.2d 40. “An agreement that fails to specify the parish or parishes, municipalities or parts thereof where the employer does business is unenforceable.” Causin, L.L.C., 271 So. 3d 203. In this case, after severing the broad language in the initial contract, all parts necessary for a valid agreement are present. (R. 029-032.)

The District Court was correct when it decided that severing the language of “any other business owned by Janice Pace,” was appropriate to resolve an issue of unenforceability. (R. at 030-031.) Moreover § 23:921 of Louisiana Revised Statute, refers to “every...provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind. . . . shall be null and void.” La. Stat. Ann. § 23:921. While the Agreement did not contain an explicit severability clause, the lower court was correct to sever the offending portions of the contract. Removing the broad language does not offend the spirit of the contract under La. Civ. Code Ann. art 2049 which would have otherwise rendered the Agreement ineffective and unenforceable.

Additionally, the statute explicitly states that, “any person. . . .may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer.” La. Stat. Ann. § 23:921(C).” Whereas the disputed non-competition agreement provides:

“[the] employee agrees that for a period of two years after the date of termination of employment with Beau Monde, Inc. Employee shall refrain from: [a] carrying on or engaging in a business similar to Beau Monde, Inc. in Cambridge Parish.” (R. at 025.)

The Agreement uses language that is directly from the statute itself and therefore compliant with this requirement to state that an employer may agree with their employee to refrain from engaging in business “similar to” their own. Again, the District Court was correct in finding that the non-compete agreement did not have to define Beau Monde’s business to valid against Roy.

## ARGUMENT

### **I. The District Court Was Correct When It Decided the Overly Broad Provision of the Non-Competition Agreement Is Severable When the Agreement Did Not Contain a Severability Clause.**

The District Court properly applied § 23:921 of Louisiana Revised Statute when it considered the severability of broad language in the Beau Monde Non-Competition Agreement. The notable language in the statute is as follows:

A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.

It is important to note that a severability clause does not require the court to reform, redraft or establish a new agreement. SWAT 24 Shreveport Bossier, Inc. v. Bond, 2000-1695 (La. 6/29/01) 808 So. 2d 294., 309. Moreover, the statute only requires

that the offending portion of the Agreement be severed to cure any possibility of annulment. Id. Section A(1) of the Louisiana Revised Statute makes specific reference to *provisionary* language in agreements that makes the contract null and void. The District Court correctly asserted that the language in the statute implies the necessity for severance in order to cure the presence of language that would have made the Agreement invalid. The Louisiana Supreme Court in SWAT 24, held that the offending portions of the non-competition agreement are severed which should also apply in our case. Id. at 310.

Here, the standard of view when determining whether the non-competition agreement falls under the exception found in § 23:921(C) of Louisiana Revised Statute is a question of law reviewed *de novo*. Paradigm Health Sys., L.L.C. v. Faust, 2016-1276 (La. App. 1 Cir. 4/12/17), 218 So. 3d 1068., 1073.

**a. The Appellee’s Non-Competition Agreement Is Enforceable Upon the Severance of Its Overly Broad Language.**

The Agreement between Beau Monde and Roy was noted as follows:

“1) Employee agrees that for a period of two years after the date of termination of employment with Beau Monde, Inc., Employee shall refrain from: (a) carrying on or engaging in a business similar to Beau Monde, Inc. in Cambridge Parish; (b) carrying on or engaging in any business similar to any other business owned by Janice Pace in Cambridge Parish; and (c) soliciting customers of Beau Monde, Inc. or any other business owned by Janice Pace.” (R. at 025.)

A valid non-competition agreement in which the former employee agreed to refrain from “carrying on or engaging in a business similar” to that of the former

employer, is limited to the type of business that they may not compete with. SWAT 24 808 So. 2d 294, 306 (citing Brown v. Texas–LaCartage, Inc., 98–1063, p. 7 (La.12/1/98) 721 So.2d 885., 889).

The Agreement between the Appellee and Appellant is valid upon the severance of the overly broad provision, most notably: “any other business owned by Janice Price.” (R. at 010.) The Court in SWAT 24 addressed whether the removal of language related to distance in a non-compete agreement needed to be enforced in order to apply any portion of the contract. Id. at 309. The Court noted that the geographical limitation was proper, but the severance of nullifying language is necessary when a provision is subject to two interpretations. Id. at 307 (citing Summit Inst. for Pulmonary Med. & Rehab., Inc. v. Prouty, 29,829 (La. App. 2 Cir. 4/9/97), 691 So. 2d 1384, 1387-88 writ denied, 97-1320 (La. 9/26/97), 701 So. 2d 983. The presence of “*any other business*,” is the only portion of the Agreement that would nullify its enactment. With the removal of the broad language, the District Court correctly upheld the Agreement’s enforceability. (R. at 028.) Hence, the non-compete agreement between the Appellee and Appellant would now contain the two elements required for valid non-competition contracts, i.e., (1) It must limit competition only in a business like that of the employer and (2) it must specify the geographic area and limit their ability to compete against their former employer for up to two years from termination of employment. Paradigm Health Sys., L.L.C. 218

So. 3d 1068, 1072 (citing Cellular One, Inc. v. Boyd, 1994-1783 (La.App. 1 Cir. 3/3/95, 653 So.2d 30, 33, *writ denied*, 1995-1367 (La. 9/15/95), 660 So.2d 449).

If there is a violation of the Agreement, the court must order injunctive relief, pursuant to La. R.S. 23:921, despite any proof of irreparable harm. Vartech Sys., Inc. v. Hayden, 2005-2499 (La. App. 1 Cir. 12/20/06), 951 So. 2d 247, 254–55. In accordance with the statute, the District Court properly granted injunctive relief upon proof by the Appellee that Roy breached the Agreement by opening Belle Monde a mere four-blocks from their location. (R. at 016.) Thus, the District Court properly interpreted La. R.S. 23:921(A)(1) and did not abuse its discretion when it found the Agreement valid upon the severability of the broad language in the contract.

**II. The District Court Was Correct in Its Interpretation of Section 23:921(C) Of the Louisiana Revised Statute Noting That Non-Compete Agreements Do Not Have to Define the Employer’s Business to Be Valid Against a Former Employee.**

The District Court properly applied § 23:921(C) of Louisiana Revised Statute when it considered whether the Agreement needed to explicitly define the employer’s business to be enforceable. The statute explicitly provides:

“...carrying on or engaging in a business similar to that of the employer.”

As noted by the lower court, “the statute does not state that valid agreements *must* define the business.” (R. at 031.) Thus, “to be valid, a noncompetition agreement may limit competition only in a business similar to that of the employer, in a

specified geographic area and for up to two years from termination of employment.” Cellular One, Inc. 653 So.2d 30, 33. While additional specificity elucidates the bounds by which the employee is held to, it is not statutorily required for the Agreement to directly define its business to be valid. Since Roy was hired as a hairdresser for Beau Monde, it is natural that Roy is enjoined from engaging in business similar to work for which she was hired to do. (R. at 013.)

Since review of this issue involves the application or interpretation of subpart (C) of § 23:921, a *de novo* standard of review is applicable. Red Stick Studio Dev., L.L.C. v. State ex rel. Dep't. of Econ. Dev., 10-0193, p. 9 (La. 1/19/11), 56 So.3d 181, 187

**a. The Appellee Did Not Have to Explicitly Define the Type of Business that Roy was Prohibited from Engaging in For the Non-Competition Agreement to Be Valid.**

Non-competition agreements are strictly construed wherein an employer is only entitled to keep ex-employees from competing with the employer’s actual business or a segment of the industry at large. Paradigm Health Sys., L.L.C. 218 So. 3d 1068, 1073 (citing Vartech Systems, 951 So.2d at 259). The court in Paradigm analyzed an agreement by invoking La. C.C. art. 2047 noting that contractual language should be given its ordinary (i.e., “generally prevailing”) meaning. La. Civ. Code Ann. art. 2047. Moreover, words that are amendable to different interpretations are to be construed in accordance with the object of the contract and each provision

should be given the meaning suggested by the contract. La. Civ. Code Ann. art 2048, 2050.

Paradigm involved a disputed non-compete agreement with general language limiting the former employee, Dr. Faust, from engaging in the “practice of medicine.” Paradigm Health Sys., L.L.C. 218 So. 3d 1068, 1074. The employer contested this assertion by arguing that the restriction only applied to similar businesses from which Dr. Faust was originally hired and not a general prohibition of the medical field. Id. at 1073-74. However, Paradigm argued that the contractual limitation only concerned the rendering of “any medical services” to any business like those services provided by Dr. Faust. Id. The court noted that prohibiting Dr. Faust from working in the fields of occupational therapy, physical therapy, and social work is too vast considering she was hired to work as a speech pathologist. Id.

Wherein Paradigm the practice of medicine has a wide array of disciplines and specialties, our case involves a hair salon and spa which likely has a niche collection of haircare services. Id., (R. at 017.) Roy was hired to work as a hairdresser for the Appellee in 2017. (R. at 013.) After acquiring clients during her tenure as an employee of Beau Monde, Roy opened a rival location ironically named, “Belle Monde,” in the same Parish as her former employer which would clearly lead to customer confusion. (R. at 016.) Roy disputes the notion that she solicited clients

from the Appellee, however this mischaracterizes the relationships she developed with those clients through her employment under Appellee. (R. at 017.) The lower court was correct in finding that the Appellee did not have to explicitly define the type of business that Roy was prohibited from engaging in because the section “carrying on or engaging in business similar to Beau Monde,” is narrow enough that it implies spa and salon work. (R. at 025.) The meaning of “business similar” should be given the meaning suggested by the contract, and in this case, would be specific to spa and salon work only. La. Civ. Code Ann. art 2050.

### CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that this Court affirm the decision of the Moot District Court granting the preliminary injunction and finding the non-competition Agreement signed by both parties is valid & in accordance with § 23:921 of Louisiana Revised Statute.

Respectfully Submitted November 13, 2022,

*Clarence Roby, III*

**Clarence M. Roby, III**  
Counsel of Record for  
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New Orleans, LA 70118  
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## Applicant Education

BA/BS From **Boston University**  
 Date of BA/BS **June 2017**  
 JD/LLB From **Washington University School of Law**  
[http://www.nalplawsonline.org/ndlsdir\\_search\\_results.asp?lscd=42604&yr=2014](http://www.nalplawsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014)  
 Date of JD/LLB **May 21, 2021**  
 Class Rank **I am not ranked**  
 Law Review/Journal **Yes**  
 Journal(s) **Washington University Global Studies Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Jessup International Law Moot Court**

### **Bar Admission**

Admission(s)      **New York**

### **Prior Judicial Experience**

Judicial  
Internships/      **Yes**  
Externships  
Post-graduate  
Judicial Law      **No**  
Clerk

### **Specialized Work Experience**

Specialized Work  
Experience      **Appellate**

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

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May 28, 2023

The Honorable Kiyo A. Matsumoto  
U.S. District Court for the Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a 2025–2026 clerkship in your chambers. I am an Assistant District Attorney in the Appeals Division of the New York County District Attorney’s Office. In 2021, I graduated from Washington University School of Law, where I was Managing Editor of the *Global Studies Law Review* and a member of my school’s Jessup International Law Moot Court Team.

My application includes my resume, writing sample, and law school transcript. My application also includes letters of recommendation from the following:

Professor Leila Nadya Sadat  
*James Carr Professor of International Criminal Law, Washington University School of Law*  
*Special Adviser on Crimes Against Humanity to the ICC Prosecutor*  
Phone: (314) 935-6411      Email: sadat@wustl.edu

Honorable Gilbert C. Sison  
*United States Magistrate Judge, U.S. District Court for the Southern District of Illinois*  
*Adjunct Professor, Washington University School of Law*  
Phone: (618) 482-9432      Email: judge\_sison@ilsd.uscourts.gov

I am happy to provide references and any other information that would be helpful to you. Thank you for your consideration.

Respectfully,



Christian Rose

**Christian A. Rose**

581 Ocean Parkway, Apt. 3F, Brooklyn, NY 11218 \* (925) 858-2511 \* christian.rose.law@gmail.com

**WORKING EXPERIENCE:**

**NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE**

**NEW YORK, NY**

*Assistant District Attorney, Appeals Division (Sept. 2021–present)*

- Write appellate briefs and argue in New York state appellate courts
- Respond to motions and leave applications
- Write internal recaps of New York appellate decisions for Appeals Division DANY Law

**CIVITAS MAXIMA, GIBRIL MASSAQUOI TRIAL MONITORING PROJECT**

**ST. LOUIS, MO**

*Student Director, supervised by Professor Kim Thuy Seelinger (Jan. 2021–June 2021)*

- Drafted and edited summaries of hearings in the Finnish criminal case of Gibril Massaquoi for atrocity crimes in the Liberian civil wars (first universal jurisdiction trial to hold hearings across multiple countries)

**NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE**

**NEW YORK, NY**

*Summer Law Fellow, Rackets Bureau (June 2020–Aug. 2020)*

- Drafted memoranda related to grand jury investigations, subpoenas, and white collar crime
- Participated in mock suppression hearing and wrote a mock post-conviction motion response
- Drafted bench brief for moot court competition

**THE HONORABLE JEFFREY S. WHITE**

**OAKLAND, CA**

*Judicial Extern, U.S. District Court (N.D. Cal.) (May 2019–Aug. 2019)*

- Drafted orders for habeas petitions, social security appeal, and class action motion
- Prepared research presentations for Judge White and law clerks regarding criminal trial and sentencing
- Attended settlement conference with Magistrate Judge Donna M. Ryu

**BLUEPRINT SCHOOLS NETWORK**

**OAKLAND, CA**

*Math Fellow and AmeriCorps Member (Aug. 2017–June 2018)*

- Taught supplemental math classes at Elmhurst Community Prep, a middle school in East Oakland
- Created and directed a free, after-school reading tutoring program
- Nominated for AmeriCorps Most Impactful Member Service Award

**EDUCATION:**

**WASHINGTON UNIVERSITY SCHOOL OF LAW**

**ST. LOUIS, MO**

*Juris Doctor (May 2021)*

- GPA: 3.65; Dean's List: Spring 2019, Fall 2020, Fall 2021
- International Academy of Trial Lawyers Award (upon graduation)
- Managing Editor of Publications, *Global Studies Law Review* (AY 2020–21)
- Earned Highest Grade: Int'l Courts & Tribunals (Fall 2019); Topics in National Security Law (Spring 2021)
- Team Captain, Jessup International Law Moot Court Team: Top 10 Oralist (U.S. Regionals 2021; Denver Regionals 2020); Best Memorial (Denver Regionals 2020)
- Head Teaching Assistant, Professor Jo Ellen Lewis (Legal Writing) (AY 2020–21)
- Appellate Clinic: wrote Fourth Circuit brief and argued in Seventh Circuit (Fall 2020)
- Teaching Assistant, Professor Leila Nadya Sadat, International Law (Fall 2020)
- Research Assistant, Crimes Against Humanity Research Project (AY 2019–20)
- Excellence in Oral Advocacy Award (Spring 2019)

**BOSTON UNIVERSITY**

**BOSTON, MA**

*B.A. in Philosophy (May 2017)*

- Dean's List every semester, graduated *cum laude*
- Editor-in-chief of feminist journal and staff editor at classics journal and philosophy journal
- Petey Greene Program: Tutored incarcerated women at MCI Framingham

**INTERESTS/ PROFESSIONAL ASSOCIATIONS:**

- Manhattan Asian Prosecutors Affinity Group
- New York City Bar Association, Criminal Advocacy Committee
- Hockey; San Francisco Bay Area sports teams

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Washington University Unofficial Transcript for: **Christian Rose**

Student ID Number: 468502

Student Record data as of: 5/17/2023 8:51:36 PM

**HOLDS** - no records of this type found

## DEGREES AWARDED

JURIS DOCTOR

May 21, 2021

## MAJOR PROGRAMS

-----Semester-----

Admitted	Terminated	Status	Code	Prime or Joint	Program
FL2018	SP2021	Closed	LW0150	Prime	JURIS DOCTORIS
SP2021	SP2021	Completed	LW0160	Prime	JURIS DOCTOR

**ADVISORS** - no records of this type found

## SEMESTER COURSEWORK AND ACADEMIC ACTION

**Note: Courses dropped with a status of 'D' will not appear on your transcript.**

**Courses dropped with a status of 'W' will appear on your transcript.**

### FL2018

-----Grade-----

Department	Course	Sec	Units	Opt	Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	500D	02	0.0	C		CIP				Legal Research Methodologies I
W74 LAW	500F	02	2.0	C		3.76				Legal Practice I: Objective Analysis and Reasoning (Lewis)
W74 LAW	502D	01	4.0	C		3.64				Criminal Law (Osgood)
W74 LAW	515D	02	4.0	C		3.76				Torts (Tamanaha)
W74 LAW	520K	01	4.0	C		3.22				Constitutional Law I (Hu)
			<b>Enrolled Units:</b> 14.0			<b>Semester GPA:</b> 3.57			<b>Cumulative Units:</b> 14.0	<b>Cumulative GPA:</b> 3.57

### SP2019

-----Grade-----

Department	Course	Sec	Units	Opt	Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	500E	02	1.0	P		CR				Legal Research Methodologies II
W74 LAW	500G	02	2.0	C		3.58				Legal Practice II: Advocacy (Lewis)
W74 LAW	501A	02	4.0	C		3.70				Contracts (P. Smith)
W74 LAW	503C	01	1.0	P		CR				Negotiation (Hollander-Blumoff)
W74 LAW	506	03	4.0	C		3.82				Civil Procedure (Levin)
W74 LAW	507D	02	4.0	C		3.64				PROPERTY (Drobak)
			<b>Enrolled Units:</b> 16.0			<b>Semester GPA:</b> 3.70			<b>Cumulative Units:</b> 30.0	<b>Cumulative GPA:</b> 3.64

HON 0001 DEAN'S LIST

**Transcript:** Yes **Expires** 12/31/2999

### FL2019

-----Grade-----

Department	Course	Sec	Units	Opt	Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	523H	01	2.0	C		PW		W 0925		Practical Legal Writing and Analysis for Litigators (Perry)
W74 LAW	542J	01	3.0	C		3.64				Criminal Procedure: Investigation (Flanders)
W74 LAW	547K	02	3.0	C		3.76				Evidence (Rosen)
W74 LAW	600R	01	1.0	P		CR				Teaching Assistant
W74 LAW	619B	01	2.0	C		3.82				International Courts and Tribunals - Practice and Procedure (Sison)
W74 LAW	660B	01	3.0	C		3.58				Appellate Advocacy (Becker/VanOstran)
W75 LAW	612S	01	1.0	P		CR				International Moot Court Team (Sadat/Sison)
W77 LAW	596S	01	1.0	P		CR				Global Studies Law Review
			<b>Enrolled Units:</b> 14.0			<b>Semester GPA:</b> 3.69			<b>Cumulative Units:</b> 44.0	<b>Cumulative GPA:</b> 3.65

HON 0001 DEAN'S LIST

**Transcript:** Yes **Expires** 12/31/2999

### SP2020

-----Grade-----

Department	Course	Sec	Units	Opt	Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	538L	01	3.0	C		3.94 CR				Corporations (Seligman)
W74 LAW	553B	01	3.0	C		CR				International Law (Sadat)
W74 LAW	580T	01	3.0	C		CR				Criminal Procedure: Adjudication (Epps)
W74 LAW	600R	01	1.0	P		CR				Teaching Assistant

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W74 LAW	642C	01	3.0	C	CR	International Money Laundering, Corruption, and Terrorism (Fagan/Delworth/Bateman)
W75 LAW	612S	01	1.0	P	CR	International Moot Court Team (Sadat/Sison)
W77 LAW	596S	01	1.0	P	CR	Global Studies Law Review

**Enrolled Units:** 15.0 **Semester GPA:** 0.00 **Cumulative Units:** 59.0 **Cumulative GPA:** 3.65

MSN 0023 SPECIAL NOTE: During the spring of 2020, a global pandemic required significant changes to coursework. Unusual enrollment patterns and grades may reflect the tumult of the time. **Transcript:** Yes **Expires** 12/31/2999

#### FL2020

-----Grade-----

Department	Course	Sec	Units	Opt	Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	600R	01	1.0	P		CR				Teaching Assistant
W74 LAW	600T	45	1.0	P		CR				Teaching Assistant
W74 LAW	634G	01	4.0	C		3.76				Federal Courts (Hollander-Blumoff)
W74 LAW	695	34	2.0	P		CR				Supervised Research
W74 LAW	800B	01	6.0	P		P				Appellate Clinic
W75 LAW	612S	01	1.0	P		CR				International Moot Court Team (Sadat/Sison)
W76 LAW	851S	01	3.0	C		PW	W 1007			The American Presidency Seminar (A. Katz)
W77 LAW	696S	01	1.0	P		CR				Global Studies Law Review

**Enrolled Units:** 16.0 **Semester GPA:** 3.76 **Cumulative Units:** 75.0 **Cumulative GPA:** 3.66

MSN 8010 NOTE: Supervised Research (Prof. Lewis): Best Practices on Engagement of 1Ls Using Virtual Learning Environment **Transcript:** Yes **Expires** 12/31/2999

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

#### SP2021

-----Grade-----

Department	Course	Sec	Units	Opt	Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	522B	01	1.0	C		4.06				Contemporary Issues in National Security Law (Berman)
W74 LAW	562C	01	2.0	C		3.46				Ethics and Professionalism in the Practice of Law (Pratzel)
W74 LAW	600R	01	1.0	P		CR				Teaching Assistant
W74 LAW	601A	01	3.0	C		PW	W 0222			Legislation (Magarian)
W74 LAW	619C	01	3.0	C		3.76				International Human Rights Law (Sadat)
W75 LAW	612S	01	1.0	P		CR				International Moot Court Team (Sadat/Sison)
W76 LAW	790S	01	3.0	C		3.58				Advanced Topics in Foreign Relations Law Seminar (Waters)
W77 LAW	696S	01	2.0	P		CR				Global Studies Law Review

**Enrolled Units:** 13.0 **Semester GPA:** 3.67 **Cumulative Units:** 88.0 **Cumulative GPA:** 3.66

HON 0209 INTERNATIONAL ACADEMY OF TRIAL LAWYERS AWARD **Transcript:** Yes **Expires** 12/31/2999

**OTHER CREDITS** - no records of this type found

#### GPA SUMMARY

----- Semester Units -----						Cumulative Units -----						Level	---- GPA ----		
Semester	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Grade Pts.	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Units	Sem.	Cum.	Level
FL2018	14.0	14.0	0.0	0.0	0.0	50.0	14.0	14.0	0.0	0.0	0.0	14.0	3.57	3.57	2
SP2019	14.0	14.0	2.0	2.0	0.0	101.8	28.0	28.0	2.0	2.0	0.0	30.0	3.70	3.64	3
FL2019	11.0	11.0	3.0	3.0	0.0	142.4	39.0	39.0	5.0	5.0	0.0	44.0	3.69	3.65	4
SP2020	0.0	12.0	3.0	3.0	0.0	142.4	39.0	51.0	8.0	8.0	0.0	59.0	0.00	3.65	5
FL2020	4.0	4.0	12.0	12.0	0.0	157.4	43.0	55.0	20.0	20.0	0.0	75.0	3.76	3.66	6
SP2021	9.0	9.0	4.0	4.0	0.0	190.4	52.0	64.0	24.0	24.0	0.0	88.0	3.67	3.66	7

#### ENROLLMENT STATUS

Semester	Start	End	Enrollment Status	Level	Units	Status Change Date
FL2018	8/27/2018	12/19/2018	Full-Time Student	1	14.0	
SP2019	1/14/2019	5/8/2019	Full-Time Student	2	16.0	
FL2019	8/26/2019	12/18/2019	Full-Time Student	3	13.0	
SP2020	1/13/2020	5/6/2020	Full-Time Student	4	15.0	
FL2020	8/24/2020	1/10/2021	Full-Time Student	6	16.0	
SP2021	1/19/2021	5/13/2021	Full-Time Student	6	13.0	

#### DEMOGRAPHICS

<b>Birthdate:</b> 1/25/1995	<b>Race:</b> 3 - Asian or Pacific Islander	<b>Semester of Entry:</b>
<b>Birth Place:</b> Wuerzburg		<b>Entry Status:</b>
<b>Date of Death:</b>	<b>Hispanic:</b>	<b>Anticipated Deg Dt:</b> 0521
	<b>American Indian:</b>	<b>Std Expt Graduation:</b>
<b>Gender:</b> M	<b>Asian:</b> Y	<b>Frozen Cohort:</b>
<b>Marital Status:</b>	<b>Black:</b>	
<b>Veteran Code:</b>	<b>Hawaiian Pacific:</b>	<b>Faculty/Staff Child:</b>
<b>Locale:</b>	<b>White:</b>	<b>Alumni Code:</b>

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**U.S. Citizen:** Y  
**Country:**  
**Visa Type:**  
**Nonresident Alien:**

**Not Reported:**

**Prof. School1:**  
**Prof. School2:**  
**Area of Interest:**  
**Area of Interest Code:**

**ADMINISTRATIVE CODES** - no records of this type found

**HIGH SCHOOL** - no records of this type found

**PREVIOUS SCHOOLS**

Name	State	Code	Type Code	Type	Degree	Degree Date	Discipline Code	GPA	GPA Type	Credit
Boston Univ	MA	003087		BA	Philosophy	0517		368		

**UNIVERSITY EMAIL ADDRESS:** c.rose@wustl.edu

**FORWARDS TO:** c.rose@email.wustl.edu

Washington University in St. Louis  
SCHOOL OF LAW

May 17, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

RE: Recommendation for Christian Rose

Dear Judge Matsumoto:

I write in enthusiastic support of Christian Rose's application for a clerkship in your chambers.

I am currently a federal magistrate judge for the United States District Court for the Southern District of Illinois. Previously, I worked for the United States Department of Justice as an Assistant United States Attorney for the Eastern District of Missouri. And, prior to that, I was a criminal defense attorney at Rosenblum, Schwartz, Rogers & Glass, PC, in St. Louis, Missouri. I have known Christian in my capacity as an Adjunct Professor at Washington University School of Law. I have been an Adjunct Professor at Washington University School of Law since the Fall of 2000.

Christian was a student in my "International Courts and Tribunals – Practice and Procedure" class in the Fall of 2019. In my Tribunals class, students learned about the practice and procedure before various international tribunals. Students would take a pre-selected legal problem and deliver oral arguments before a mock international tribunal. Throughout the class, Christian consistently demonstrated his outstanding skills as an oral advocate. In fact, Christian was one of the best in the class in responding to a judge's questions as he had an uncanny ability to deliver insightful, logical and precise answers. Despite the superior skills he displayed, Christian was always willing to seek out and accept constructive criticism of his performances before, during and after class.

In the Fall of 2019, I had a class of 19 students. In my course, students are graded on various categories with knowledge of the law, application of law to facts and ability to answer questions being the most important. In his graded oral arguments, Christian had the top scores in his class with respect to these three categories. He always displayed a thorough command of various international law sources and was quite adept at weaving them together into a coherent and persuasive argument. In the end, Christian's efforts earned him the highest grade in the class. I have been teaching this class since 2004, and in that time I have taught approximately 275 students. I would easily place Christian in the top 5% of all students that I have taught. As an adjunct professor, I also serve as coach of the school's prestigious Philip C. Jessup ("Jessup") International Moot Court team. I have been the school's coach since the Fall of 2000. Christian was an integral and invaluable member of the team from 2019 to 2021. In his first year on the team, the Jessup problem involved issues relating to the law of state succession regarding treaties and the application of international humanitarian law to newly developed and unique weapons systems. Both areas were quite complicated and contained subtle nuances that were difficult to understand for one not trained in the study of international law. Despite the difficulty posed by these subjects, Christian was always able to gain a handle on the principal sources, such as cases, treaties and conventions. He was also successful in finding more obscure sources and displayed an expert understanding of such sources during oral argument. In large part because of Christian's efforts, the team excelled at its regional competition in Denver, Colorado, in February 2020. The team finished as regional runner-up. The team also earned first place for its memorials, which are the written submissions and briefs submitted to the Court. This is an extremely rare feat, as the school has achieved this distinction only four other times in program history.

Christian also took home individual honors by being named the fifth best oralist in the regional competition. In fact, Christian argued and won the semi-final round which qualified the team to compete in the International rounds of the tournament in Washington, D.C. The tournament can be analogized to the World Cup in soccer as over 120 teams from all over the world compete to be recognized as world champion. Unfortunately, the 2020 tournament was cancelled because of the COVID-19 pandemic. Despite that disappointment, Christian's success continued in his second year with the team as he was a top 10 oralist in the U.S. regional competition in 2021. In my experience, Christian is the rare individual who excels in both oral advocacy and writing. Christian is clearly in the top 5% of students that I have coached in my 23 years with the program. In fact, if I had a clerkship opening at the time of his graduation in May 2021, I would not have hesitated to offer him a position.

What struck me about my interactions with Christian is his ability to work well in a collaborative and team setting. I experienced that first-hand by seeing how he interacted with his colleagues on the Jessup team. Christian was always willing to work cooperatively and share and impart his knowledge and research to others. Christian is also a natural leader. As a first year

Gilbert Sison - gsison@rsrglaw.com

member, he quickly earned the trust of the two senior members of the team as they both entrusted him with various team related duties. In his second year, he seamlessly transitioned to be the team's captain. In this new role, he was tasked with leading the team's four new members, which was a Herculean task in and of itself, as he was the only returning member with experience. Finally, Christian freely gives his time to help others. Even after his graduation, he stayed heavily involved with the school's Jessup program. For example, Christian took time out of his busy schedule as an Assistant District Attorney in New York County to tutor this past year's Jessup team on the finer aspects of researching and writing for the Jessup competition.

The mark of an excellent lawyer is to realize that there is always room for improvement. It is this humble attitude which I believe will serve Christian well as he progresses in his career. Couple this with his strong work ethic, ability to work well with others and enthusiasm for the study of law, and I have no doubt that he will make a valuable and positive contribution to your chambers. I whole-heartedly and enthusiastically recommend Christian and hope that you too will see the promise of an outstanding and talented young lawyer.

If you have any questions about Christian, please do not hesitate to contact me at (314) 458-5478.

Best,

/s/

Judge Gilbert Sison  
*Adjunct Professor*

Washington University School of Law  
One Brookings Drive, MSC 1120-250-258  
St. Louis, MO 63130  
(314) 935-6420

Gilbert Sison - [gsison@rsrglaw.com](mailto:gsison@rsrglaw.com)

Washington University in St. Louis  
SCHOOL OF LAW

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April 10, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

RE: Recommendation for Christian Rose

Dear Judge Matsumoto:

This letter is in support of Christian Rose's application for a clerkship with you. He is one of the finest students I have had the privilege to teach over the past 30 years, and I cannot recommend him highly enough. He will be a fabulous addition to your Chambers, a great help to you in your critically important work, and will leave a lasting positive impression when he has completed his rotation.

I worked with Christian from his first semester in law school until the end of his third year. He was nothing short of spectacular as a research assistant, a teaching assistant, and a student. During his first year, Christian was one of two 1Ls selected to work on the Crimes Against Humanity Research Project, a project I advise where students research and write on topics about the International Criminal Court. In his time with the project, Christian and his fellow research assistants wrote about the jurisdiction of the Court over crimes committed against the Rohingya in Myanmar, research that was critical to me as a Special Adviser to the ICC Prosecutor on Crimes Against Humanity. This research was part of the information that the Prosecutor ultimately used to open an investigation into the Rohingya case in 2019. Christian's work was first rate, even though he had not yet taken any courses in international law, and his commitment and conscientiousness to the project was exemplary.

I subsequently had the privilege of having Christian as a student during his second and third years. He took my International Law class in the Spring 2020 semester. In lieu of grades for the COVID-impacted semester, I gave prizes for the top three final exams, and Christian wrote one of the top three exams. In fact, I asked Christian to be my teaching assistant for International Law the next semester, where he helped prepare slides for class and held office hours for students. His academic work for me was outstanding, and in addition for his work for me, I know that he did a terrific job as Managing Editor of the *Washington University Global Studies Law Review*, as a legal writing teaching assistant, and as standout member of the Law School's Appellate Advocacy Clinic, where he wrote a brief filed in the U.S. Fourth Circuit Court of Appeals, and actually argued a case in the Seventh Circuit.

I also got to know Christian well in my capacity as the faculty advisor for Washington University's Jessup International Law Moot Court team, one of the top Jessup programs in the country. Christian was a team member for two years and was a team captain his second year. Both years, the team won awards for their performance and qualified for the competition's international rounds. Christian also received individual awards in oral advocacy in regional and international rounds as one of the top 10 students in the Regional competition. His strong interpersonal skills and easygoing personality helped the team to grow into a cohesive whole; and his extraordinarily good writing and research skills helped catapult the team to a very strong placement, advancing to the U.S. Regional finals and receiving an award for the best memorial. Even after graduation, Christian has continued to be involved with Jessup. He returned to remotely coach Washington University's Jessup team after graduation and recently gave a presentation to incoming Jessup members about writing winning memorials for the competition.

In short, in my view, Christian has the research, writing, and organizational skills that will make him a wonderful law clerk. He has my highest recommendation, and I urge you to give his application the strongest possible consideration.

Best,

/s/

Leila Sadat  
*James Carr Professor of International Criminal Law*  
*Director of the Whitney R. Harris World Law Institute*  
*Special Adviser on Crimes Against Humanity to the ICC Prosecutor*

Washington University School of Law

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(314) 935-6420

Leila Sadat - [sadat@wustl.edu](mailto:sadat@wustl.edu) - 314-935-6411

Christian Rose  
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Brooklyn, New York 11218  
(925) 858-2511  
christian.rose.law@gmail.com

This writing sample is based on an unedited first draft of a brief that I wrote as an Assistant District Attorney in the Appeals Division of the New York County District Attorney's Office. I received edits for the brief most recently in December 2021. I revised the unedited draft in May 2023 for this writing sample with minimal reference to the final brief. The brief is addressed to New York's Supreme Court, Appellate Division, First Department. For brevity, I have included only a short introduction of the facts and omitted the second issue in the brief related to a challenge for cause to a prospective juror. Though the brief is based on matters of public record, I have altered or deleted any identifying information.

## INTRODUCTION

In the early hours of April 5, 2019, Jane Doe and two of her friends were walking along 96th Street near Sixth Avenue in Manhattan when Jane saw defendant leaning against scaffolding, blocking her way. As she tried to step around defendant, he pulled Jane’s purse from her right shoulder, breaking its strap, and ran away. Jane and her two friends chased after defendant and wrestled the purse away from defendant, and he fled the scene. Police arrived and searched the area with Jane and her friends. Jane identified defendant as the man who stole her purse. Defendant claimed he did not recall stealing Jane’s purse because he had smoked PCP. Jane suffered bruising and a strained shoulder that hurt for weeks.

### **I. The People overwhelmingly proved that defendant physically injured Jane.**

After a jury trial, defendant was convicted of second-degree robbery. On appeal, defendant argues that his conviction was unsupported by legally sufficient evidence and against the weight of the evidence. Defendant claims that he did not physically injure Jane while stealing her purse. But Jane’s detailed account of her severe and prolonged pain—corroborated by medical records, her broken purse, and photographs of her injury—proved that Jane suffered physical injury.

#### **A. Standard of review.**

A verdict is legally sufficient if the facts, “viewed in the light most favorable to the People, give a “valid line of reasoning . . . that could lead a rational person to

conclude that every element of the charged crime [was] proven beyond a reasonable doubt.” *People v. Gordon*, 23 N.Y.3d 643, 649 (2014) (quoting *People v. Delamota*, 18 N.Y.3d 107, 113 (2011)). In applying this standard, this Court must fully credit the People’s witnesses and draw all reasonable inferences favorable to the People. *See id.* at 649; *People v. Danielson*, 9 N.Y.3d 342, 349 (2007). After marshalling all facts and favorable inferences, this Court then decides whether “a jury could logically conclude that the People sustained its burden of proof.” *People v. Kancharla*, 23 N.Y.3d 294, 302 (2014).

Under weight of the evidence review, if a different verdict “would not have been unreasonable,” then this Court “must weigh conflicting testimony” to decide “whether the jury was justified in finding the defendant guilty.” *Kancharla*, 23 N.Y.3d at 303 (quoting *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987)). Even still, this Court “does not take the place of the jury in passing on questions of” reliability and credibility of testimony but rather “gives great deference” to the jury and its superior position to weigh the evidence at trial. *People v. Griffin*, 63 A.D.3d 635, 638 (1st Dept. 2009). That is because the jury, alone, can “view the witnesses, hear the testimony and observe demeanor.” *Kancharla*, 23 N.Y.3d at 303 (quotation marks and alterations omitted).

To prove that defendant committed second-degree robbery, the People had to prove that defendant forcibly stole property from Jane and, during the commission

of the crime or flight, caused her physical injury. *See* Penal Law § 160.10(2)(a). “Physical injury,” in turn, is the “impairment of physical condition or substantial pain.” Penal Law § 10.09(9); *see People v. Chiddick*, 8 N.Y.3d 445, 447 (2007). Pain need not be “severe or intense to be substantial,” *Chiddick*, 8 N.Y.3d at 447, so long as the victim’s injuries “caused more than slight or trivial pain.” *People v. Godfrey*, 199 A.D.3d 590, 590 (1st Dept. 2021). Therefore, “[r]elatively minor injuries causing moderate . . . pain may suffice, as may injuries that did not require medical treatment.” *People v. Spinac*, 185 A.D.3d 498, 499 (1st Dept. 2020). In finding whether a defendant caused physical injury, this Court considers the “victim’s subjective description of what [they] felt” alongside objective factors like corroboration of the pain and what pain “would normally be expected” from such an injury. *Chiddick*, 8 N.Y.3d at 447. Of course, whether the evidence established physical injury is a question generally reserved for the jury, and if there is an objective basis in the record supporting physical injury, this Court respects that finding. *See People v. Guidice*, 83 N.Y.2d 630, 636 (1994).

**B. Defendant caused physical injury to Jane when he robbed her.**

Here, voluminous evidence proved that defendant caused Jane to suffer physical injury. When robbing Jane, defendant tore Jane’s purse down on her shoulder with such force that its leather strap broke over her shoulder, injuring her shoulder. Within hours, Cumberbatch could not “put any weight on [her] shoulder”

and had to sleep on her opposite side, which she continued for two weeks. (Jane D.: 44–45.) Her pain was intense: a “4 out of 10” at rest and an “8 out of 10” at worst. (Jane D.: 64–65; Peo.’s Ex. 4: 3 (medical records).) Jane’s shoulder “ach[ed] and throb[ed]” and “radiated up to her neck.” (Jane D.: 60, 64–65; Peo.’s Ex. 4: 3.) This pain lasted for three weeks. (Jane D.: 48–49.) Defendant’s actions thus undeniably caused Jane “more than slight or trivial pain.” *Godfrey*, 199 A.D.3d at 590.

Even beyond Jane’s compelling account of her injury, the People presented the jury with layers of corroborating evidence. Photographs showed a bruise about the width of a purse strap wrapping around Jane’s shoulder, and Jane explained that she did not “bruise easily” because of her “dark skin.” (Peo.’s Exs. 1–2; *see People v. Woods*, 201 A.D.3d 412, 413 (1st Dept. 2022) (“victim’s account of his injury was corroborated by other evidence, including photographs”).) The People also presented Jane’s purse and its broken leather strap to demonstrate the force of defendant’s theft. (*See* Peo.’s Ex. 3.)

Also compelling were Jane’s medical records and treatment. On the advice of her mother, a nurse, Jane consulted a doctor, who diagnosed Jane with a strained trapezius, the muscle covering the rear of the neck and shoulders. (*See* Peo.’s Ex. 4: 3.) The doctor prescribed painkillers and recommended physical therapy. Jane attended one physical therapy session for her shoulder, but her insurance would not cover more because she was already attending physical therapy for a torn hip. So

Jane's physical therapist gave Jane exercises for her shoulder to do at home. The worst of Jane's pain subsided after three weeks, but at trial over a year later, Jane still sometimes felt grating or clicking in her shoulder. In the face of this evidence, defendant is wrong to claim that Jane's injury was just a "thin bruise" with "some pain" for a "limited period." (Def.'s Br., at 25–26).

This Court routinely holds that injuries like Jane's proved "physical injury." *See People v. Howard*, 158 A.D.3d 456, 455–56 (1st Dept. 2018) (victim required suture for cut on hand, used pain medication, and had pain and tenderness for . . . two weeks"); *People v. Alejandro*, 156 A.D.3d 572, 572–73 (1st Dept. 2017) (pain varied from "a lot of pain to a great deal of pain," and "hospital records indicated bruising and swelling"); *People v. Deas*, 102 A.D.3d 464, 464 (1st Dept. 2013) (injuries to "interfered with . . . walking, writing, and sleeping for several days"); *Matter of Veronica R.*, 268 A.D.2d 287, 288 (1st Dept. 2000) (victim had "swollen neck, scratches and pain that limited . . . mobility for" about a week); *People v. Valentine*, 212 A.D.2d 399, 399 (1st Dept. 1995) (victim had swollen and sore neck, back, and arm after being pushed by the defendant). For these reasons, the People showed that defendant caused Jane physical injury.

Defendant's arguments to the contrary either (1) minimize the harm that defendant caused Jane, (2) imply that Jane's actions after the robbery undercut the seriousness of her injury, or (3) rely on outdated or distinguishable cases. First,

defendant argues that defendant “did not physically touch [Jane’s] person at all” but only pulled Jane’s purse off her shoulder. (Def.’s Br., at 25.) Of course, a person need not lay their hands on another to cause injury to the victim. It is common sense that pulling a purse off another’s shoulder with such intensity that the strap breaks—like defendant did to Jane—would likely cause that person injury. *See People v. Stephens*, 83 A.D.3d 588, 588 (1st Dept. 2011) (defendant pulled necklace off victim’s neck). So defendant’s claim that he “had no motive to inflict any kind of injury,” Def.’s Br., at 30, is unconvincing because his choice in his means of stealing Jane’s purse was almost certain to cause injury to Jane. In any event, because the credibility of Jane’s subjective pain assessment is best left to the discretion of the factfinder, this Court should not second-guess the jury’s reasonable finding on appeal. *See People v. Reid*, 197 A.D.3d 1071, 1072 (1st Dept. 2021).

Second, defendant suggests that Jane’s actions after the robbery contradicted Jane’s account of her pain. Defendant first asserts that because Jane and her friend laughed in the 911 call, this “drastically undermined” Jane’s account. (Def.’s Br., at 27.) By now, it should be obvious that a victim laughing after a traumatic event does not undermine the gravity of that event, and the brief laughter in the call appears to be motivated by immense relief at recovering Jane’s purse and escaping the incident

without more serious injury.<sup>1</sup> Defendant also points to Jane’s friend telling the 911 operator that nobody was hurt as evidence that Jane’s injuries were not severe, see Def.’s Br., at 27, but Jane’s friend was not the person injured, and Jane did not develop pain until hours later.

Defendant then mischaracterizes Jane’s actions as “continuing on with her evening plans . . . stay[ing] out with her friends until approximately 2:30 A.M.” (Def.’s Br., at 28.) Defendant did not even rob Jane until around 1:20 a.m. After finding defendant at around 1:30 a.m., the group went to the precinct for about a half hour, leaving at around 2:00 a.m. Understandably still hungry—as defendant interrupted their original plan to eat food—the police drove the group to Amy Ruth’s, where they stayed just long enough to get takeout and left between 2:00 and 2:30 a.m. All said, within about an hour, the group was robbed, recovered the loot, found defendant, gave their statements to police, and then got takeout before heading straight to a friend’s apartment to sleep. To say this was Jane and her friends “continuing on with her evening plans,” Def.’s Br., at 28, insinuating that they were out enjoying themselves until the wee hours of the morning, is baseless.

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<sup>1</sup> See, e.g., Jim Hopper, End Violence Against Women Int’l, *Important Things to Get Right About the “Neurobiology of Trauma”*, at 7–8 (2020) (“laughter reveals little or nothing about what was happening” in a victim’s brain at the time they laughed); George A. Bonanno, *Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive After Extremely Adverse Events?*, 59 Am. Psych. 20, 26 (2004) (laughter may be a coping mechanism).

As for Jane's medical treatment, defendant first imputes nefarious intent to Jane's decision to go to the hospital a few days after the incident, claiming it "is telling" that Jane went to the hospital after she had talked to the Assistant District Attorney and before she testified before the Grand Jury. (Def.'s Br., at 29.) Defendant's cynical suggestion that Jane went to the hospital only at the urging of the prosecutor is wrong. After all, Jane's mother, a nurse, told Jane to see a doctor, advice which Jane followed. Defendant also cannot suggest that the doctor was in on the prosecutor's scheme when he diagnosed Jane with a strained trapezius, prescribed her painkillers, and recommended physical therapy.

Defendant next complains that Jane "self-treat[ed] with heat and ice" and attended physical therapy "only *once*." (Def.'s Br., at 29 (emphasis in original).) To begin with, an injury treated with ice and pain medication for about a week can be physical injury. *See People v. Rollins*, 273 A.D.2d 159, 160 (1st Dept. 2000); *People v. Marsh*, 264 A.D.2d 647, 647 (1st Dept. 1999) (victim treated injury with ice for several days). Still, Jane took painkillers prescribed by her doctor, and even though Jane could attend only one formal physical therapy session because of her insurance, she performed exercises at home that her physical therapist recommended.

Finally, because defendant is wrong about the extent of Jane's injury, his comparisons of her injury to cases in which there was no physical injury fall flat. And the cases defendant cites are unpersuasive for two more reasons: First,

defendant ignores the development of the law of physical injury over time when citing decades-old cases. Second, defendant's cases had insufficient descriptions or corroboration of a victim's injury.

During the 1970s and 1980s, the Court of Appeals interpreted "physical injury" to "require a significant level of proof," with black eyes, red marks from punches, and even some gunshot wounds not always enough. William C. Donnino, *Supplementary Practice Commentary, McKinney's Consolidated Laws of New York*, Penal Law § 10.00 ("Physical Injury") (citing *People v. McDowell*, 28 N.Y.2d 373 (1971); *People v. Rojas*, 61 N.Y.2d 726 (1984)). But during the late 1980s and through the 1990s, the Court "began to temper its view" and found physical injury from cuts, bruises, and hard kicks. *Id.* (citing *People v. Greene*, 70 N.Y.2d 860 (1987); *People v. Tejeda*, 78 N.Y.2d 936 (1991)). Finally, in 2007, in *People v. Chiddick*, the Court set the "lowest threshold of physical injury" as not requiring even "severe or intense" pain. *Id.* (quoting *Chiddick*, 8 N.Y.3d at 447). That case aligned with the legislature's intent to exclude from "physical injury" mere "petty slaps, shoves, kicks and the like." *Id.* (citing Staff Notes of Temp. Staff Comm'n on Rev. Penal L. & Crim. Code, art. 125, at 330 (1964)). Since *Chiddick*, a victim suffers physical injury if their injuries "caused more than slight or trivial pain." *Godfrey*, 199 A.D.3d at 590. Thus, the pre-*Chiddick* cases that defendant cites reflect a stricter threshold for physical injury than now exists.

Still, all defendant's cases are distinguishable. In the post-*Chiddick* cases, the evidence about the degree of the victims' injuries was simply too scarce. For example, in *People v. Rios*, 142 A.D.3d 28 (1st Dept. 2016), the only evidence of injury to the victim, who did not testify, was photographs of "slight redness" on the victim's neck. 142 AD3d at 29–30. And in *People v. Young*, 99 A.D.3d 739 (2d Dept. 2012), the victim, who again did not testify, only received Tylenol for pain caused by the defendant's punch or push. 99 A.D.3d at 740. Similarly, defendant's pre-*Chiddick* cases addressed injuries supported only by vague or uncorroborated evidence. *See, e.g., People v. Carney*, 179 A.D.2d 818, 818 (2d Dept. 1992) (victim received bruises and took Tylenol but did not testify about the degree or duration of the pain or how the injury affected her daily activities). Here, however, not only did Jane offer detailed testimony about the degree and duration of her pain, but her injuries were corroborated by photographs, her medical records, and her treatment.

In sum, the People proved that defendant physically injured Jane beyond any reasonable doubt.

## Applicant Details

First Name **Avrohom**  
 Last Name **Rosskamm**  
 Citizenship Status **U. S. Citizen**  
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 Address

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**Street**  
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**State/Territory**  
**New York**  
**Zip**  
**11230**  
**Country**  
**United States**

Contact Phone Number **7189134998**

## Applicant Education

BA/BS From **Post University**  
 Date of BA/BS **May 2016**  
 JD/LLB From **Benjamin N. Cardozo School of Law, Yeshiva University**  
[http://www.nalplawschoolsonline.org/ndlsdir\\_search\\_results.asp?lscd=23314&yr=2010](http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23314&yr=2010)  
 Date of JD/LLB **June 1, 2021**  
 Class Rank **10%**  
 Law Review/Journal **Yes**  
 Journal(s) **Cardozo Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Monrad G. Paulsen Competition, Cardozo Moot Court Honor Society**

## Bar Admission

Admission(s)      **New York**

### **Prior Judicial Experience**

Judicial  
Internships/      **Yes**  
Externships  
Post-graduate  
Judicial Law      **Yes**  
Clerk

### **Specialized Work Experience**

Specialized Work      **Appellate, Habeas, Prison Litigation, Pro Se,**  
Experience      **Social Security**

### **Recommenders**

Minuse, Catherine  
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212-857-8824  
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stern@yu.edu  
646-592-6464  
Cunningham, Laura E.  
cunningh@yu.edu  
Weisberg, Richard  
rhwaisbg@yu.edu  
212-790-0299

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**

Avi Rosskamm

324 Elmwood Avenue, Brooklyn, NY 11230 • (718) 913-4998 • rosskamm@law.cardozo.yu.edu

May 15, 2023

The Honorable Kiyo Matsumoto  
United States District Court for the Eastern District of New York  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

RE: 2025–2026 Term Clerkship

Dear Judge Matsumoto:

I am a law clerk at the Staff Attorney's Office at the United States Court of Appeals for the Second Circuit, and I am a 2021 graduate of the Benjamin N. Cardozo School of Law in New York, where I ranked in the top 10% of my class and served on the editorial board of the *Cardozo Law Review*. I am writing to apply for a 2025–2026 term clerkship position in your chambers.

As an aspiring litigation attorney and having served as a law clerk at the Second Circuit, in addition to completing three judicial internships during law school, I believe my skills and experience will make me a strong addition to your chambers. At the Second Circuit, I write thorough and precise bench memoranda on a variety of substantive and procedural legal issues concerning diverse areas of law, including civil rights (42 U.S.C. § 1983), constitutional law, criminal law and procedure, habeas corpus, employment discrimination (Title VII), class action litigation, appellate procedure and jurisdiction, and civil procedure. During my 2L spring semester, I served as an extern in the chambers of the late Hon. Paul G. Feinman, New York Court of Appeals, and during my 1L summer, I interned in the chambers of the Hon. Nicholas G. Garaufis, United States District Court for the Eastern District of New York. Further, my Note, *Exhausting Comity-Based Abstention in the FSIA's Expropriation Exception*, has been published in the *Cardozo Law Review*.

My resume, transcript, and writing samples are submitted with this application. Cardozo will submit letters of recommendation from Catherine J. Minuse, Supervising Staff Attorney, United States Court of Appeals for the Second Circuit, Professor Laura Cunningham, Professor Stewart Sterk, and Professor Richard Weisberg, under separate cover. Further references from Hon. Nicholas G. Garaufis and David Bober, Director of the Staff Attorney's Office, United States Court of Appeals for the Second Circuit, and additional writing samples, are available upon request.

I would be honored to have the opportunity to interview with you and further discuss my qualifications. Thank you for considering my application.

Respectfully submitted,

  
Avi Rosskamm

## Avi Rosskamm

324 Elmwood Avenue, Brooklyn, NY 11230 • (718) 913-4998 • rosskamm@law.cardozo.yu.edu

### **BAR STATUS**

Admitted in New York (2022)

### **EDUCATION**

#### **Benjamin N. Cardozo School of Law, New York, NY**

Juris Doctor, *magna cum laude*, May 2021

GPA: 3.677 Class Rank: Top 10%

Honors: Order of the Coif; *Cardozo Law Review* (Vol. 42), *de•novo* Editor; *Cardozo Law Review* (Vol. 41), Staff Editor; *Cardozo Moot Court Honor Society*, Monrad G. Paulsen Competition, Second Best Brief Award and Semifinalist (November 2019); Richard H. Weisberg Writing Award (May 2021).

Activities: Civil Procedure Teaching Assistant, Professor Suzanne L. Stone (August 2020 – December 2020); Lawyering and Legal Writing Teaching Assistant, Professor Christopher Serbagi (September 2019 – May 2020); Intensive Transactional Lawyering Program (January 2021).

Publications: Note, *Exhausting Comity-Based Abstention in the FSIA's Expropriation Exception*, 42 CARDOZO L. REV. 1113 (2021).

Comment, *Owner Entitled to Cancellation of Notice of Pendency Upon Posting of Bond*, N.Y. REAL EST. L. REP., Mar. 2021.

Comment, *Judgment Lien Enforced Despite Error in Docketed Amount*, N.Y. REAL EST. L. REP., Apr. 2021.

#### **Post University, Waterbury, CT**

Bachelor of Science, *summa cum laude*, in Business Administration and Management, May 2016

GPA: 3.99

### **EXPERIENCE**

#### **United States District Court for the Southern District of New York, White Plains, NY**

*Incoming Law Clerk for the Hon. Victoria Reznik*, June 2023 – June 2024

#### **United States Court of Appeals for the Second Circuit, New York, NY**

*Law Clerk for the Staff Attorney's Office*, August 2021 – June 2023

*Summer Law Intern for the Staff Attorney's Office*, May 2020 – August 2020

Prepared bench memoranda and proposed orders for the judges of the Second Circuit recommending dispositions in appeals and substantive motions concerning diverse areas of law, including civil rights (42 U.S.C. § 1983), constitutional law, criminal law and procedure, habeas corpus, employment discrimination (Title VII), appellate procedure and jurisdiction, and civil procedure.

#### **Shearman & Sterling LLP, New York, NY**

*Legal Intern*, January 2021 – April 2021

Drafted a cross-indemnity agreement, a limited waiver agreement, and an opinion letter for real estate-related transactions. Created lease abstracts, closing checklists, and key dates and deadlines summaries for real estate deals. Marked up a construction contract. Edited and updated Chapter 24 of *Commercial Contracts: Strategies for Drafting and Negotiating*, which covers commercial leases.

#### **New York Court of Appeals, New York, NY**

*Judicial Extern for the Hon. Paul G. Feinman*, January 2020 – April 2020

Conducted legal research and analysis, and drafted, edited, and proofread bench memoranda for pending appeals, criminal leave applications, and civil motions for leave to appeal, including an appeal relating to whether New York State should adopt cross-jurisdictional tolling in class action litigation.

#### **United States District Court for the Eastern District of New York, Brooklyn, NY**

*Judicial Intern for the Hon. Nicholas G. Garaufis*, May 2019 – August 2019

Conducted legal research and analysis, and drafted, edited, and proofread bench memoranda, including a habeas corpus petition, challenging 18 U.S.C. § 924(c)'s "residual clause" as unconstitutionally vague, and a Rule 12(b)(6) motion in a breach of contract lawsuit. Observed courtroom proceedings, including a seven-week high-profile criminal trial.

Date Issued: 10-JUN-2021

Yeshiva University  
500 W 185th Street  
New York, NY 10033-3201

Page: 1

# UNOFFICIAL

Avrohom Rosskamm

Last 4 SSN: \*\*\*\*\*9957

Date of Birth: 17-MAY

Level of Study: First Professional

Only Admit: Summer 2018					SUBJ NO.	COURSE TITLE	CRED GRD	R
Comments:					Institution Information continued:			
Writing Requirement Completed - 08/11/2020					Fall 2019			
Anticipated Juris Doctor					JD Cardozo School of Law			
Ehrs: 88.000 Qpts: 235.328					Law			
GPA- Hrs: 64.000 GPA: 3.677					Continuing			
Associated Program Information					LAW 7419	Business Immigration Law	2.000	B+
Program: Juris Doctor					LAW 7441	Wides, Michael	3.000	A-
College : Cardozo School of Law					LAW 7601	Trusts & Estates	4.000	A
Major : Law					LAW 7914	Zelinsky, Edward	1.000	P
					LAW 7939	Federal IncomeTax I	0.000	P
					LAW 7953	Cunningham Laura	1.000	P
					LAW 7992	Legal Wit Research	2.000	A+
					Newman, Leslie			
					Law Review			
					Shaw, Kate			
					Paulsen Competition			
					Lipshie, Burton			
					E-Discovery			
					Gabriel, Manfred			
					Ehrs:	13.000 Qpts:	42.333	
					GPA- Hrs:	11.000 GPA:	3.848	
INSTITUTION CREDIT:					Winter 2020			
Summer 2018					JD Cardozo School of Law			
JD Cardozo School of Law					Law			
New First Time					Continuing			
LAW 6003	Contracts	5.000	A-	LAW 7309	Negotiation Theory & Skills	2.000	B+	
LAW 6101	Goodrich, Peter	3.000	B	Tsur, Michael				
LAW 6202	Criminal Law	2.000	B	Ehrs: 2.000 Qpts: 6.666				
					GPA- Hrs: 2.000 GPA: 3.333			
					Fall 2018			
					JD Cardozo School of Law			
					Law			
					Continuing			
LAW 6300	Civil Procedure	5.000	B+	Spring 2020				
LAW 6703	Yablon, Charles	4.000	B+	JD Cardozo School of Law				
LAW 6790	Torts	1.000	B+	Law				
					Continuing			
					LAW 7060	Corporations	4.000	P
					LAW 7301	Weinstein, Samuel	3.000	P
					LAW 7753	Federal Courts	3.000	P
					LAW 7914	Reinert, Alex	1.000	P
					LAW 7939	Prof. Responsibility	1.000	P
					LAW 7996	Sebok, Anthony	1.000	P
					LAW 7998	Legal Wit Research	2.000	P
					Newman, Leslie			
					Law Review			
					Shaw, Kate			
					Public Sector Externship Sem			
					Webb, Lauren			
					Public Sector Ext Field Plcmt			
					Smith, Roberta			
					Ehrs:	15.000 Qpts:	0.000	
					GPA- Hrs:	0.000 GPA:	0.000	
Spring 2019					***** CONTINUED ON PAGE 2 *****			
JD Cardozo School of Law								
Law								
Continuing								
LAW 6403	Property	5.000	A					
LAW 6501	Sheff, Jeremy	3.000	B+					
LAW 6791	Constitutional Law I	2.000	B+					

Date Issued: 10-JUN-2021

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500 W 185th Street  
New York, NY 10033-3201

Page: 2

**UNOFFICIAL**

Avrohom Rosskamm

Last 4 SSN: \*\*\*\*\*9957

Date of Birth: 17-MAY

Level of Study: First Professional

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
-----					
Institution Information continued:					
Summer 2020					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7790	Advanced Legal Research Smith, Olivia	1.000	P	
	Ehrs:	1.000	Qpts:	0.000	
	GPA- Hrs:	0.000	GPA:	0.000	
Fall 2020					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7360	Introduction to Trial Advocacy Horn, Mbshe	2.000	B+	
LAW	7424	Contract Drafting Madsen, Bertrand	3.000	A-	
LAW	7502	Constitutional Law II Pearlstein, Debor	4.000	A	
LAW	7611	Corporate Tax Zelinsky, Edward	3.000	A	
LAW	7900	Teaching Assistant Stone, Suzanne	1.000	P	
LAW	7940	Law Review Editorial Bd Shaw, Kate	1.000	P	
	Ehrs:	14.000	Qpts:	45.667	
	GPA- Hrs:	12.000	GPA:	3.805	
Winter 2021					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7374	Int Transactional Lawyer Prog Greenberg-Kobrin,	3.000	P	
	Ehrs:	3.000	Qpts:	0.000	
	GPA- Hrs:	0.000	GPA:	0.000	
Spring 2021					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7330	Evidence Stein, Edward	4.000	A+	
LAW	7609	Partnership Tax Cunningham, Laura	3.000	A	
LAW	7940	Law Review Editorial Bd Gilles, Myriam	1.000	P	
LAW	7958	Real Estate Reporter Sterk, Stewart	2.000	A	
	Ehrs:	10.000	Qpts:	37.332	
	GPA- Hrs:	9.000	GPA:	4.148	

\*\*\*\*\* CONTINUED ON NEXT COLUMN \*\*\*\*\*

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
THURGOOD MARSHALL U.S. COURTHOUSE  
40 FOLEY SQUARE  
NEW YORK, NEW YORK 10007

DEBRA A. LIVINGSTON  
CHIEF JUDGE

DAVID BOBER  
DIRECTOR OF LEGAL AFFAIRS

February 2023

Dear Judge

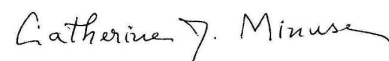
I am writing in enthusiastic support of Avrohom Rosskamm's clerkship application. I am a Supervisory Staff Attorney at the United States Court of Appeals for the Second Circuit. Avi has worked in this office as a Staff Attorney law clerk since August 2021 and previously worked as a summer intern in 2020. I have personally supervised him during that time.

The primary function of the Staff Attorney's Office is to provide panels of circuit judges with bench memoranda on pro se appeals, pro se substantive motions, counseled substantive motions, and immigration cases. In their memoranda, the staff attorneys review the facts and procedural history of each appeal, analyze the applicable law, and recommend the proper disposition. Staff attorneys are required to handle a large number of cases, produce high quality work, and meet tight deadlines. They must also have an appropriate sensitivity to the pro se cases.

Avi has drafted bench memoranda on a wide variety of criminal and civil issues, primarily in pro se cases. He handles habeas corpus, civil rights, employment discrimination, criminal, prisoners' rights, social security and many other kinds of cases. He works with complex issues of civil procedure and appellate jurisdiction and sees the inner workings of an appellate court.

I am very impressed with Avi's performance. I have found his work to be dependable, focused, thoughtful, and meticulous. He is a conscientious, hard-working lawyer who researches skillfully and writes well. He is organized, efficient, and highly productive, taking on work when others are overwhelmed and volunteering for emergency motions. Moreover, he is clearly interested in the issues presented by his cases, dedicated to his work, and a pleasure to supervise. I served as a district court law clerk in the Southern District of New York upon graduation from law school and I believe I understand the demands of a clerkship. Avi would meet those demands and I am happy to recommend him for a position in your chambers.

Sincerely,



Catherine J. Minuse

**CARDOZO**  
**BENJAMIN N. CARDOZO SCHOOL OF LAW - YESHIVA UNIVERSITY**  
**JACOB BURNS INSTITUTE FOR ADVANCED LEGAL STUDIES**  
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Stewart E. Sterk  
H. Bert and Ruth Mack  
Professor of Real Estate Law  
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May 15, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write on behalf of Avi Rosskamm, a former student of mine, who is seeking a clerkship in your chambers. Avi is a talented lawyer who has all of the tools necessary to be an excellent law clerk and I am delighted to recommend him.

I worked closely with Avi when he was a student in a small seminar I teach in which students prepare comments on recent New York real estate cases. The comments are designed for publication in a monthly newsletter. Avi was the standout student in the class. His first drafts were always well-written and to the point, and he was quick to incorporate suggestions he received from me and from other class members. I ultimately published all of the comments he drafted, which does not often happen. Avi also was quick to identify problems with the drafts of his classmates, but he did so in a respectful and gentle way, making it easier for the recipient to hear and act on those problems. I was impressed with Avi's work and his work ethic.

Avi has really come in to his own during law school. He came to law school with a non-traditional educational background, but he has made the most of his law school experience. His judicial externships during law school and his Second Circuit experience will prepare him well for a clerkship in your chambers.

On a personal level I am confident that Avi will work well with members of your chambers staff. He has the maturity and judgment that will make him a valuable representative of your office in dealings with lawyers and others.

In short, Avi Rosskamm deserves your serious attention. You will not be disappointed if you hire him as your law clerk.

Stewart E. Sterk

H. Bert and Ruth Mack Professor of Real Estate Law

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**CARDOZO LAW**  
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May 15, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing this letter to offer my enthusiastic support for Avi Rosskamm's application to act as a law clerk in your chambers. If you have the opportunity to meet Avi I'm sure you'll agree that he is whip smart, dedicated and an excellent writer, all of which make him an excellent candidate.

I know Avi because he took two classes with me during his time at Cardozo, Federal Income Tax and Partnership Tax. Avi's exam performance in both classes was extraordinary, his was the third highest score in income tax (98%) and the fourth highest in Partnerships (96%). Both courses involve extensive statutory interpretation, and Partnerships requires a deep dive into the Treasury regulations. Viewed in the context of his full transcript, it becomes obvious that Avi earned his spot at the top of his graduating class. He performed at the highest level across disciplines and challenged himself throughout law school.

At Cardozo Avi demonstrated that his research and writing skills are terrific. He not only was on the Law Review, where his note was published, he also competed with the Moot Court Honor Society, and excelled. He pursued multiple opportunities to work with judges during his time at Cardozo, and successfully turned a summer internship with the Second Circuit's Staff Attorney's office into a post-graduation clerkship with that office.

I spoke with Avi recently and was impressed with how his confidence and understanding of himself have developed over his first year at the Second Circuit. He is thoroughly enjoying his time there, in particular the exposure that he is getting to various judges and types of law. While at the end of law school he told me he was leaning toward a career in litigation, the last year has clinched that preference. He loves to research and write, and he hopes to get yet more experience in chambers before looking for a permanent job.

By all objective measures, Avi is an excellent writer. He also has strong statutory analysis skills, something that singles him out. On a more subjective note, he strikes me as a very serious and focused person. We are lucky at Cardozo to have excellent students, but there are only one or two each year who demonstrate the kind of breadth that Avi has. I enjoyed having him in my classes and am confident he would be a welcome addition to your chambers.

If I can be of any further assistance in evaluating Avi's application, please contact me.

Sincerely,

Laura E. Cunningham  
Professor of Law

Laura E. Cunningham - [cunningh@yu.edu](mailto:cunningh@yu.edu)

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May 15, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Re: Avi Rosskamm

Dear Judge Matsumoto:

I heartily endorse Avrohom Rosskamm as a candidate for a clerkship in your chambers. A talented writer, whose work on Holocaust restitution has just been published in the **CARDOZO LAW REVIEW**, Mr. Rosskamm has demonstrated to me over the several years I have advised him on that note a fine ability to attack difficult legal issues. He writes quite well, and in several conferences he has attended on Holocaust restitution and the Foreign Sovereign Immunities Act he has also participated (via the Zoom Q & sessions) in oral communication and debate to great effect.

I am sure that he will bring all these noteworthy skills to the environment of your chambers, easing your travails while also occasionally challenging you to re-consider certain positions.

I would be delighted to discuss his candidacy more with you at the phone number below.

With best wishes,

Richard Weisberg  
Floersheimer Prof. of Constitutional Law  
and Distinguished Visiting Prof., U of Pittsburgh Law School  
(646) 812-4159

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## Avi Rosskamm

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### Writing Sample

The attached writing sample consists of a bench memorandum I drafted in my capacity as a law clerk at the Staff Attorney's Office, United States Court of Appeals for the Second Circuit. The factual details discussed throughout this sample, including names, dates, and citations to the record have been altered to maintain the privacy of the parties and to retain the integrity of the court. Furthermore, this sample has been edited by my supervisor, Catherine J. Minuse, whom I work closely with daily.

### Issue Raised and Recommendation

**Issue:** David Frankel, pro se, appeals from the district court's dismissal of his trademark infringement action against SooZoo, Inc., a social media platform. Frankel and Dingy Empire, Inc. (collectively, the "Plaintiffs"), represented by counsel at that time, sued SooZoo in Connecticut Superior Court, claiming that SooZoo had infringed on Dingy Empire's trademark by refusing to take down several SooZoo pages containing the words "Dingy Empire." Plaintiffs also raised state law claims for tortious interference with business relations, trade libel, negligence, and unfair trade practices. After SooZoo removed the action to the District of Connecticut and Plaintiffs filed multiple amended complaints, the district court granted SooZoo's motion to dismiss, reasoning that Plaintiffs had failed to state their claims. After Plaintiffs appealed, the Clerk of Court informed Frankel that he could not proceed pro se on behalf of Dingy Empire. Frankel elected to proceed only on behalf of himself. The issue is whether to affirm the judgment.

**Recommendation:** Affirm the judgment because the district court correctly dismissed the action.

### Background

#### **I. State Court Proceedings**

In December 2020, Dingy Empire, Inc., represented by counsel, sued SooZoo, Inc., in Connecticut Superior Court, alleging as follows. Record on Appeal ("ROA") doc. 1 (Compl.) at

7–12. Dingy Empire is a Connecticut corporation with its principal place of business in Connecticut. *Id.* at 7. SooZoo is a foreign corporation with its principal place of business in California, which does business in Connecticut. *Id.* SooZoo’s website is an internet social media platform that, as relevant here, hosts users, including merchants, who can advertise, promote, and sell their goods and services. *Id.* Dingy Empire sells goods over the internet, primarily relies on the internet for its business model, and uses SooZoo to advertise its products for sale. *Id.* Dingy Empire’s wares included clothes, cosmetics, and jewelry. *Id.* at 9. SooZoo hosts a webpage with the name “Dingy Empire,” which was created without Dingy Empire’s consent. *Id.* at 8. SooZoo has allowed this page to be “corrupted” or “infiltrated” by others, such that when potential customers click on Dingy Empire’s page, they “are diverted to disturbing images of false content videos and websites which are unrelated to and are harmful” to Dingy Empire’s business reputation. *Id.* Consequently, customers are discouraged from conducting business with Dingy Empire. *Id.* Although Dingy Empire has “repeatedly” requested SooZoo to cease this “practice,” SooZoo has refused to take any remedial action. *Id.* SooZoo’s refusal to act has caused Dingy Empire to lose revenues and profits and has destroyed its business value. *Id.*

Additionally, Dingy Empire maintains a trademark for its logo and for its goods. *Id.* at 9. At some point, Dingy Empire discovered that SooZoo hosted “several pages” bearing the Dingy Empire trademark. *Id.* Although Dingy Empire submitted a “take down request” for three of the pages because of the alleged trademark infringement, SooZoo refused to act. *Id.* at 10. Dingy Empire also raised claims under state law for unfair and deceptive trade practices. *Id.*

Dingy Empire sought compensatory and punitive damages, costs, attorney’s fees, and injunctive relief, requiring SooZoo to “correct and fix its website so that the false and faulty information associated with Dingy Empire’s name is corrected.” *Id.* at 11.

## II. District Court Proceedings

On January 15, 2021, SooZoo removed the action to the District of Connecticut, pursuant to 28 U.S.C. §§ 1331, 1338, 1367, 1441(a), and 1446. *Id.* at 1 (Notice of Removal). SooZoo asserted that the District of Connecticut had federal question jurisdiction under § 1331 and supplemental jurisdiction under § 1367, based on Dingy Empire’s trademark infringement claim, under § 1338. *Id.* at 1–2. Removal was timely because SooZoo was served on December 22, 2020, and SooZoo removed the action on January 15, 2021, within the 30-day period prescribed by § 1446(b). *Id.* at 2.

In April 2021, SooZoo moved to dismiss the action for failure to state a claim and Dingy Empire opposed. ROA docs. 36 (Mot.), 36-1 (Mem.), 39 (Opp.), 40 (Mem.). However, before the district court ruled on the motion, Dingy Empire submitted several amended complaints and moved to join Frankel, the owner of the Dingy Empire trademark. *See* ROA docs. 41 (Joinder Mot.), 43 (Am. Compl.), 53 (Second Am. Compl.), 57 (Third Am. Compl.). The district court granted the motion to amend and terminated the motions to dismiss and to join. ROA docs. 46, 49, 54 (Text Ors.).

Filed in June 2021, the operative complaint added Frankel as a plaintiff, realleged the same set of facts, and raised claims for trademark infringement under federal and state law,<sup>1</sup> tortious interference with business relations, trade libel, negligence, and unfair trade practices, under the Connecticut Unfair Trade Practices Act (“CUTPA”), Conn. Gen. Stat. § 42-110a.<sup>2</sup> ROA doc. 57

<sup>1</sup> Conn. Gen. Stat. § 35-11i(a) provides a civil remedy for the infringement on a Connecticut-registered trademark.

<sup>2</sup> CUTPA prohibits any person from “engag[ing] in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Conn. Gen. Stat. § 42-110b(a).

at 1–5. Plaintiffs sought the same relief Dingy Empire sought in state court and included a request for a temporary injunction. *Id.* at 6.

The operative complaint stated that exhibits were attached, but no exhibits were included in this version of the complaint. *See generally id.* at 1–9. An earlier version of the complaint included exhibits, which showed as follows. ROA doc. 43 at 8–33. Exhibit A contained SooZoo screenshots of a page titled “Dingy Empire.” *Id.* at 12–18. The “About” section of the page showed that the page belonged to a musician in Malindi, Kenya. *See id.* at 13, 15. Exhibit B contained emails from an attorney, asking SooZoo to take down pages that were infringing on the Dingy Empire trademark. *See id.* at 20–31. Exhibit C contained a photo of the Dingy Empire logo. *Id.* at 33.

In September 2021, SooZoo moved to dismiss the action, arguing as follows. ROA doc. 60 (Mot.). The federal trademark infringement claim failed because Plaintiffs did not allege a likelihood of confusion, such that there was similarity between the trademark and posts on the alleged infringing webpages, and the exhibits showed that none of the webpages contained the Dingy Empire trademark. ROA doc. 60-1 (Mem.) at 17–19. The state law trademark infringement claim failed because Plaintiffs did not allege that they had registered any trademark under state law. *Id.* at 19–20. Plaintiffs did not state a tortious interference with business relations claim for two reasons. *Id.* at 11–13. First, Plaintiffs’ allegations were insufficient to provide SooZoo with fair notice of their claim because the complaint did not identify Plaintiffs’ own SooZoo page, including whether the page was maintained by Frankel or the Dingy Empire corporate entity, and because the complaint did not identify where visitors were being redirected to or what was offensive or disturbing about those pages. *Id.* at 11. Second, Plaintiffs failed to allege the necessary elements of a tortious interference claim. *Id.* at 12–13. The trade libel claim failed for

two reasons. *Id.* at 13–15. First, Plaintiffs failed to state several elements of a trade libel claim. *Id.* at 13. Second, SooZoo was protected from liability under the Communications Decency Act (“CDA”), 47 U.S.C. § 230(c)(1).<sup>3</sup> *Id.* at 14–15. The negligence claim failed because SooZoo did not have a duty to prevent interference with Plaintiffs’ trademark, and even if SooZoo did have such a duty, the complaint did not allege that other pages used Plaintiffs’ trademark. *Id.* at 15–17. Finally, the unfair trade practices claim failed because Plaintiffs did not offer any facts to explain how SooZoo had violated CUTPA. *Id.* at 20–21.

SooZoo moved to stay discovery. ROA docs. 61 (Mot.), 61-1 (Mem.). The district court granted the motion. ROA doc. 70 (Text Or.).

Plaintiffs moved to reamend their complaint. ROA docs. 65 (Mot.) at 1; *id.* (Proposed Fourth Am. Compl.) at 6–39; 66 (Mem.). The proposed fourth amended complaint raised the same claims and factual allegations but attached the exhibits that had been attached to the version of the complaint at ROA doc. 43. *Compare* ROA doc. 65 at 6–39 *with* ROA doc. 43 at 8–33 *and* ROA doc. 57 at 1–6. SooZoo opposed the motion because the proposed amendment did not contain new factual allegations and only added exhibits, which SooZoo was already treating as incorporated by reference into the operative complaint. *See* ROA doc. 69 (Mem.) at 3–4. Additionally, SooZoo would have been prejudiced by the amendment because a new complaint would have mooted the outstanding motion to dismiss. *Id.* at 4–5. The district court denied the motion, reasoning that there were no new allegations and SooZoo was already treating the exhibits as incorporated into the operative complaint. ROA doc. 71 (Text Or.).

In October 2021, Plaintiffs opposed the motion to dismiss, arguing as follows. ROA doc.

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<sup>3</sup> 47 U.S.C. § 230(c)(1) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

67 (Opp.). The SooZoo pages did cause a likelihood of confusion because they used the words “Dingy Empire” and one of the pages had a cover photo stating “New Products Coming Soon.” *Id.* at 5–6, 18. Plaintiffs sufficiently stated their tortious interference, trade libel, negligence claims, and CUTPA claims. *Id.* at 3–7. SooZoo’s invocation of CDA immunity was misguided because the CDA was “not designed to limit any intellectual property law” claims. *Id.* at 2–3.<sup>4</sup> Plaintiffs attached SooZoo screenshots from three SooZoo pages, titled “Dingy Empire.” *Id.* at 10–22.

SooZoo replied and reiterated their arguments. *See generally* ROA doc. 68 (Reply).

In June 2022, the district court dismissed the action, reasoning as follows. ROA doc. 78 (Or.). The federal trademark infringement claim failed because the complaint did not sufficiently allege a likelihood of confusion between the Dingy Empire trademark and the challenged SooZoo pages. *Id.* at 11. Although the screenshots showed photos of people wearing jewelry, a hat, and sweatpants, there was no likelihood of consumer confusion because none of those pages were selling clothes or jewelry. *Id.* Though one of the screenshots read “new products coming soon,” there was nothing on that page explaining what products were “coming soon” or whether those products were similar to Plaintiffs’ products. *Id.* at 11–12. The state law trademark infringement claim failed because Plaintiffs did not allege that they owned a trademark registered under Connecticut state law. *Id.* at 12. The tortious interference claim failed because Plaintiffs did not allege that SooZoo knew about any specific business relationship between Plaintiffs and a third party and then intentionally interfered with it. *Id.* at 5–6. At most, Plaintiffs alleged that SooZoo refused to cease a practice that was within its ability to cease, but SooZoo’s refusal to grant a

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<sup>4</sup> 47 U.S.C. § 230(e) provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.”

takedown request was not equivalent to interfering with a business relationship. *Id.* at 6. The trade libel claim failed because Plaintiffs did not explain how the SooZoo screenshots were defamatory or offensive. *Id.* at 7–8. The negligence claim failed because even if SooZoo had a duty to prevent trademark infringement, Plaintiffs did not plausibly allege a trademark infringement claim. *Id.* at 9. Finally, the CUTPA claim failed because it was “entirely derivative of the other claims” and since the other claims failed, so did the CUTPA claim. *Id.* at 12.

Plaintiffs timely appealed. ROA docs. 79 (6/14/2022 J.), 82 (6/22/2022 NOA).

Frankel submitted a notice of appearance, stating he would proceed pro se. ROA doc. 84 (Notice of Appearance). Frankel paid the filing fee. *See* ROA doc. 82 (Docket Entry).

### **III. Proceedings in this Court**

In this Court, Frankel was informed that he could not appear pro se on behalf of Dingy Empire because he is not an attorney. *See* 00-0000, doc. 16 (Notice). Frankel filed a notice of appearance only on behalf of himself. *See id.*, doc. 18 (Notice of Appearance).

Frankel’s brief argues that all his claims were meritorious. *See generally id.*, doc. 114 (Br.). SooZoo’s brief defends the district court’s dismissal of the action. *See generally id.*, doc. 120 (Br.) Frankel’s reply reiterates his contentions. *See generally id.*, doc. 124 (Reply).

## **Discussion**

### **I. Applicable Standards**

This Court “review[s] de novo a district court’s dismissal of a complaint pursuant to [Fed. R. Civ. P.] 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.” *Kim v. Kimm*, 884 F.3d 98, 102–03 (2d Cir. 2018) (internal quotations omitted).

## II. Federal Trademark Infringement Claim

“A plaintiff alleging trademark infringement in violation of the Lanham Act must demonstrate that (1) it has a valid mark that is entitled to protection and that (2) the defendant’s actions are likely to cause confusion with that mark.” *Hamilton Int’l Ltd. v. Vortic LLC*, 13 F.4th 264, 271 (2d Cir. 2021) (alteration and internal quotations omitted). To satisfy the second prong, “[a] plaintiff must show a probability of confusion, not a mere possibility, affecting numerous ordinary prudent purchasers.” *Id.* (internal quotations omitted). This Court has “identified a non-exhaustive list of factors” to evaluate “when considering whether a mark’s use is likely to cause confusion.” *Id.* at 272. These factors are:

(1) the strength of the mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the prior owner will bridge the gap [by developing a product for sale in the market of the defendant’s product]; (5) actual confusion; (6) the reciprocal of defendant’s good faith in adopting its own mark; (7) the quality of defendant’s product; and (8) the sophistication of the buyers.

*Id.* (internal quotations omitted); *accord Tiffany & Co v. Costco Wholesale Corp.*, 971 F.3d 74, 84–85 (2d Cir. 2020).

The district court correctly dismissed the federal trademark claim. Plaintiffs alleged that several SooZoo pages used Dingy Empire’s mark, but Plaintiffs did not allege how those pages were likely to cause confusion. *See* ROA doc. 57 at 1–2, 4–5. Accordingly, Plaintiffs failed to satisfy the likelihood of confusion prong and insufficiently stated a federal trademark infringement claim. *See Hamilton Int’l Ltd*, 13 F.4th at 271–72.

## III. Connecticut Trademark Infringement Claim

Conn. Gen. Stat. § 35-11i(a) provides a civil remedy against

any person who . . . uses in Connecticut, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a mark registered under this chapter in connection with the sale, offering for sale, distribution or advertising

of any goods or services on or in connection with which such use is likely to cause confusion or to cause mistake or to deceive as to the source or origin of such goods or services.

Plaintiffs' Connecticut trademark infringement claim failed because they did not allege that they registered any trademark under state law. *See* ROA doc. 57 at 4–5 (providing only a federal trademark registration). Moreover, as with the federal trademark infringement claim, Plaintiffs did not adequately show how the challenged SooZoo pages were likely to cause confusion. Accordingly, Plaintiffs failed to state a trademark infringement claim under Connecticut law.

#### **IV. Tortious Interference with Business Relations Claim**

Under Connecticut law, to state a tortious interference with a business relations claim, a plaintiff must establish: “(1) a business relationship between the plaintiff and another party; (2) the defendant’s intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss.” *Wellswood Columbia, LLC v. Town of Hebron*, 171 A.3d 409, 428 n.15 (Conn. 2017); *accord Am. Diamond Exch., Inc. v. Alpert*, 28 A.3d 976, 986 (Conn. 2011).

Plaintiffs proffered two facts in support of this claim. First, SooZoo hosted webpages with the name Dingy Empire. ROA doc. 57 at 2. Second, SooZoo allowed Plaintiffs’ webpage “to be corrupted or infiltrated by others such that when potential customers clicked on the Dingy Empire page, they were diverted to disturbing images of false content, videos, and websites, which were unrelated to and were harmful to the Plaintiffs’ business reputation and image.” *Id.* However, Plaintiffs did not proffer any facts showing that SooZoo knew about any specific business relationship between Plaintiffs and a third party, and knowing of that relationship, intentionally interfered with it. Although Plaintiffs “repeatedly asked” SooZoo to take down those pages, *id.*,

SooZoo's ignoring of takedown request does not amount to intentional interference, *Wellwood Columbia, LLC*, 171 A.3d at 428 n.15. Accordingly, Plaintiffs failed to state a tortious interference claim.

## V. Trade Libel Claim

Under Connecticut law, trade libel is “a species of defamation,” which requires a “damaging statement . . . that disparages a person's goods or services [and is] made ‘of and concerning’ the person stating the cause of action.” *Qsp, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 917–18 (Conn. 2001).

Plaintiffs alleged that the SooZoo webpages containing the words “Dingy Empire” were “defamatory of the Plaintiffs’ legitimate business in that they charge improper conduct or a lack of skill or integrity in one’s business and is of such a nature that it is calculated to cause injury to one in its profession or business” and that the screenshots were “offensive and harmful to the Plaintiffs’ business” because “they in no way represent the Plaintiffs’ actual business operations and [were] offensive to the customers.” ROA doc. 57 at 3. However, these allegations were insufficient to state a trade libel claim. Plaintiffs proffered no facts in support of these allegations. *See id.* Plaintiffs did not explain how the screenshots were defamatory or offensive. *See id.* Finally, Plaintiffs did not explain why other SooZoo pages using the name “Dingy Empire” and containing posts by third parties meant that SooZoo had made a “statement.” *See id.* Accordingly, Plaintiffs failed to state a trade libel claim.

## VI. Negligence Claim

Under Connecticut law, to state a negligence claim, a plaintiff “must establish duty; breach of that duty; causation; and actual injury.” *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 127 (2d Cir. 2013) (internal quotations omitted); *accord Raspberry Junction Holding, LLC v. Se. Conn.*

*Water Auth.*, 263 A.3d 796, 804 (Conn. 2021).

Plaintiffs claimed that SooZoo “owe[d] a duty to the Plaintiffs to not allow its trademark to be interfered with.” ROA doc. 57 at 3. However, even if SooZoo did owe Plaintiffs a duty to prevent third parties from infringing on Plaintiffs’ trademark, Plaintiffs did not plead a breach, as Plaintiffs failed to plausibly allege a trademark infringement. *See supra* Parts II, III. Accordingly, Plaintiffs inadequately stated a negligence claim.

## VII. Connecticut Unfair Trade Practices Act Claim

CUTPA prohibits any person from “engag[ing] in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Conn. Gen. Stat. § 42-110b(a). CUTPA provides a private cause of action for “[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment” of an unfair or deceptive act. Conn. Gen. Stat. § 42-110g(a); *see Dane v. UnitedHealthcare Ins. Co.*, 974 F.3d 183, 189–90 (2d Cir. 2020). “An ascertainable loss is a loss that is capable of being discovered, observed or established.” *Dane*, 974 F.3d at 190 (quoting *Fairchild Heights Residents Ass’n v. Fairchild Heights, Inc.*, 82 A.3d 602, 620 (Conn. 2014)).

Plaintiffs CUTPA claim merely incorporated the allegations they raised in their other claims and then alleged that “[t]he actions of the Defendant as aforesaid which are continuing and ongoing constitute a violation of CUTPA for which the Plaintiffs ha[ve] suffered damages which are or may be quantifiable in that its actions have created confusion in the marketplace.” ROA doc. 57 at 5–6. Plaintiffs inadequately pleaded a CUTPA claim. Plaintiffs did not establish any deceptive acts or practices. At most, they alleged that SooZoo “created a confusion in the marketplace.” *Id.* at 6. However, as explained *supra*, Plaintiffs did not show how the other pages titled “Dingy Empire” were likely to cause any confusion. Additionally, Plaintiffs failed to allege

an “ascertainable loss,” *Dane*, 974 F.3d at 190, as the operative complaint acknowledged that their damages “may be unquantifiable,” ROA doc. 57 at 6. Accordingly, Plaintiffs failed to state a CUTPA claim.

#### **VIII. Leave to Amend**

This Court “review[s] the district court’s denial of leave to amend for abuse of discretion.” *Kim*, 884 F.3d at 105. The district court did not abuse its discretion by denying Plaintiffs’ motion to reamend. ROA doc. 71. The proposed amended complaint raised the same factual allegations as the operative complaint and the district court treated the exhibits that were attached to the proposed amended complaint as incorporated into the operative complaint. Accordingly, leave to amend was appropriately denied as futile. *See Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (per curiam).

#### **Conclusion**

Accordingly, the Court should affirm the judgment.

## Avi Rosskamm

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### Writing Sample

The attached writing sample consists of a bench memorandum I drafted in my capacity as a law clerk at the Staff Attorney’s Office, United States Court of Appeals for the Second Circuit. The factual details discussed throughout this sample, including names, dates, and citations to the record have been altered to maintain the privacy of the parties and to retain the integrity of the court. Furthermore, this sample has been edited by my supervisor, Catherine J. Minuse, whom I work closely with daily.

### Issue Raised and Recommendation

**Issue:** Daniel Jager, pro se, appeals the dismissal of his action against the Commodity Futures Trading Commission, Reparations Program (“CFTC”) and the National Austrian Bank, LTD (“NAB”). In May 2021, Jager filed a diversity action against the CFTC and NAB. The district court granted NAB’s motion to dismiss for lack of personal jurisdiction because NAB was not subject to general or specific jurisdiction in New York. The district court also sua sponte dismissed Jager’s claims against the CFTC for lack of subject matter jurisdiction, citing sovereign immunity. The district court did not clarify if the dismissal was without prejudice. The issue is whether to affirm the judgment.

**Recommendation:** Affirm the judgment, but remand to the district court to amend the judgment to reflect that the dismissal was without prejudice.

### Background

#### **I. District Court Proceedings**

In May 2021, Jager sued the CFTC and NAB, alleging as follows. Record on Appeal (“ROA”) doc. 1 (Compl.). NAB had “custodianship” over what Jager calls his “capital fund assets” and had wrongly refused to return the funds to him. *Id.* at 5. Instead, NAB had provided “access to unauthorized and illegal operative retail forex [i.e., foreign exchange] merchant dealers

[who] affirmed to be non-compliance registered solicitors in violation of the United States Commodity Exchange Act.” *Id.* NAB “intend[ed] to designate the cause of an investment forex scam as the sole illegal beneficiary and claimant of [Jager’s] own personal equity funds.” *Id.* Jager had brought a proceeding before the CFTC, in which a judgment officer determined that Jager had failed to establish that NAB violated the Commodity Exchange Act or CFTC regulations. *See id.* at 5–6.

In the action underlying this appeal, subject matter jurisdiction was grounded in diversity of citizenship because Jager was a Florida domiciliary, the CFTC had a Washington, D.C., address, and NAB was incorporated in Vienna, Austria, and had a “principal place of business in New York City.” *Id.* at 2–4, 8. He identified the “[p]lace(s) of occurrence” as “Miami, Florida.” *Id.* at 5. He sought compensatory, punitive, and restitution damages. *Id.* at 6.

Jager attached fifteen documents to his complaint. As relevant here, they clarify as follows. In 2013, Jager opened a forex account with ABC Markets, Ltd with \$7,500. ROA doc. 1-15 (Ex.) at 6. NAB was the depository for ABC Markets. *Id.* at 7. Jager traded in that account until 2016 and allegedly suffered \$117,687.13 in trading losses. *Id.* at 6. In May 2017, Jager commenced what the CFTC calls a “voluntary decisional procedure” with the CFTC, alleging that NAB “breached some duty in accepting ABC Markets’ deposits” and that NAB was liable for the full amount of his trading losses. *Id.* at 7–8. The “voluntary decisional procedure” form stated that “[b]y electing the voluntary procedure, you will waive your right to appeal.” *Id.* at 8. The CFTC dismissed the voluntary procedure complaint and subsequently denied reconsideration because Jager failed to state a claim under the Commodity Exchange Act or its accompanying regulations. *See id.* at 10.

The district court issued summonses as to the CFTC and NAB. ROA docs. 9, 10

(Summonses). Jager filed affidavits of service, which showed that he sent summons to the CFTC in Washington, D.C., and “to the Office of the Attorney General (OAG) for the District of Columbia” and that he had a process server serve NAB in Vienna, Austria. ROA docs. 11 at 1; 12 (Affidavits).

In August 2021, NAB moved to dismiss the complaint for lack of personal jurisdiction. ROA doc. 24 (Mot.). NAB attached a declaration from its general counsel, stating that NAB was incorporated in Vienna, Austria, and that it maintained its headquarters there. ROA doc. 26 (Decla.) at 2. The general counsel noted that NAB maintained a single office in the United States, which was located in New York City. *Id.*

NAB argued as follows. NAB was not subject to general jurisdiction in New York because NAB was incorporated in Austria and its principal place of business, i.e., the place where its officers direct, control, and coordinate its activities, was also in Austria. ROA doc. 25 (Mem.) at 7. NAB was not subject to specific jurisdiction in New York because Jager did not allege that NAB had any suit-related contacts with New York. *Id.* at 8–9. Jager’s complaint had listed the “place[] of occurrence” as “Miami, Florida” and NAB’s alleged conduct, serving as ABC Markets’ depository, was unconnected to New York. *Id.*

Jager opposed, arguing that NAB had a “principal office” in New York City. ROA doc. 28 (Opp.) at 1. NAB replied and acknowledged that it had an office in New York City but stated that it was not its principal place of business. ROA doc. 29 at 5.

In February 2022, the district court granted NAB’s motion to dismiss and sua sponte dismissed Jager’s claim against the CFTC. ROA doc. 31 (Or.). Jager had failed to allege personal jurisdiction over NAB. *Id.* at 3–4. Since NAB was neither headquartered nor incorporated in New York, New York did not have general jurisdiction over NAB. *Id.* at 4. Because Jager did not

allege any conduct that occurred in New York, New York had no connection to his litigation, and there was no specific jurisdiction over NAB. *Id.* Sua sponte dismissal over Jager’s claim against the CFTC was warranted because the CFTC’s Reparations Program was administered by a federal agency, which was entitled to sovereign immunity, and sovereign immunity implicated the court’s subject matter jurisdiction. *Id.* at 4–5. The district court did not clarify if the dismissals were without prejudice. *See generally id.*; ROA doc. 32 (J.).

Jager timely appealed. ROA docs. 32 (2/18/2022 J.), 33 (4/6/2022 NOA); *see* Fed. R. App. P. 4(a)(1)(B)(ii) (providing 60 days to appeal when “a United States agency” is a party).

## II. Proceedings in this Court

The appeal is fully briefed. Jager argues as follows. 2d Cir. 00-0000, doc. 23 (Br.). NAB is subject to personal jurisdiction in New York because it “conducted substantial business in the United States by and through its New York office” and NAB’s “principal and only place of business in the United States is its Manhattan, New York office.” *Id.* at 15–16. Sovereign immunity was inapplicable to his claim against the CFTC because the Administrative Procedure Act authorized him to seek review of the CFTC’s administrative determination in the district court. *Id.* at 19–21.

The CFTC argues that the district court correctly sua sponte dismissed Jager’s claim against it for lack of subject matter jurisdiction. *Id.*, doc. 31 (Br.) at 6. The CFTC also argues that it was never served in compliance with Fed. R. Civ. P. 4(i). *Id.* at 6–7. Rule 4(i) required Jager to serve the United States Attorney for the district in which he filed the action and the United States Attorney General, but Jager never obtained summons for them. *Id.* at 7. However, there is no need to allow Jager another opportunity to properly serve the CFTC “merely to have this case boomerang back to this Court.” *Id.* Instead, the Court should affirm on sovereign immunity

grounds. *Id.*

NAB defends the district court’s dismissal for want of personal jurisdiction. *See generally id.*, doc. 35 (Br.).

Jager’s reply reiterates his contentions and adds as follows. *Id.*, doc. 38 (Reply). The CFTC’s failure to appear “was not due to [his] not filing proof of service of process,” but rather, its own “negligence” and that “the notion of sovereign immunity has no actual applicability” to this case. *Id.*, doc. 27 (Opp.) at 1–2.

The CFTC has filed a sur-reply, arguing that Jager’s assertion that he properly served the CFTC was incorrect. *Id.*, doc. 39 (Reply). On May 11, 2021, Jager requested a summons addressed to the CFTC and on June 14, 2021, Jager filed an affidavit of service, in which he purported to have mailed copies to the CFTC and the “Office of the Attorney General (OAG) for the District of Columbia.” *Id.* at 1–2.

## Discussion

### **I. Applicable Standards**

When reviewing a district court’s dismissal of a complaint for lack of personal jurisdiction, lack of subject matter jurisdiction, and under sovereign immunity, this Court reviews the legal conclusions de novo and factual findings for clear error. *See Beaulieu v. Vermont*, 807 F.3d 478, 483 n.1 (2d Cir. 2015) (subject matter jurisdiction and sovereign immunity); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 128 (2d Cir. 2013) (personal jurisdiction).

### **II. Subject Matter Jurisdiction/Sovereign Immunity**

The district court correctly dismissed Jager’s claim against the CFTC for lack of subject matter jurisdiction. “Issues of federal sovereign immunity implicate a court’s subject-matter jurisdiction.” *Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 415–16 (2d Cir. 2022). “The

plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence.” *Cooke v. United States*, 918 F.3d 77, 80 (2d Cir. 2019) (internal quotations omitted).

Federal agencies are entitled to sovereign immunity because an action against a federal agency “is essentially a suit against the United States.” *Robinson v. Overseas Mil. Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994). “The United States, as sovereign, is immune from suit unless it waives immunity and consents to be sued.” *Cooke*, 918 F.3d at 81. Such “a waiver must be ‘unequivocally expressed in the statutory text.’” *Id.* (quoting *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)). This Court “must strictly construe matters concerning the waiver of sovereign immunity in favor of the government.” *Id.* at 80 (citing *United States v. Sherwood*, 312 U.S. 584, 590 (1941)).

Congress has not expressly waived sovereign immunity for the CFTC or its Reparations Program. To the contrary, Congress delegated the issue of waiver to the CFTC. Congress stated that the CFTC “may promulgate such rules, regulations, and orders as it deems necessary or appropriate,” which “may prescribe, or otherwise condition, without limitation, . . . rights of appeal, if any.” Futures Trading Act of 1982, Pub. L. No. 97-444, § 231(2), 96 Stat. 2294, 2319 (codified at 7 U.S.C. § 18(b)); *see* 7 U.S.C. § 1a(8) (defining “Commission” as CFTC). Congress also stated that “[a]ny order of the [CFTC] entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States *Court of Appeals* for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located.” Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 106, 88 Stat. 1389, 1394 (codified as amended at 7 U.S.C. § 18(e)) (emphasis added).

The Code of Federal Regulations provides three alternative forms of reparations proceedings: a “voluntary decisional proceeding,” a “summary decisional proceeding,” and a

“formal decisional proceeding.” 17 C.F.R. § 12.26(a)–(c). The Regulations provide that a voluntary proceeding is final and unappealable. 17 C.F.R. § 12.106(d) (“[A] final decision may not be appealed to a U.S. Court of Appeals . . .”). The summary and formal proceedings are appealable to the Court of Appeals. *See* 17 C.F.R. §§ 12.210(e), 12.314(e).

In this case, Jager commenced a voluntary decisional proceeding. *See* ROA doc. 1-15 at 8. Therefore, under 7 U.S.C. § 18(b) and 17 C.F.R. § 12.106(d), the CFTC’s decision was not appealable. Accordingly, neither Congress nor the CFTC has waived CFTC’s right to sovereign immunity. *Cooke*, 918 F.3d at 81. Even if Jager had commenced a summary or formal proceeding, or if 17 C.F.R. § 12.106(d) were invalid or unconstitutional, *see Myron v. Hauser*, 673 F.2d 994, 1008 (8th Cir. 1982) (entertaining a Seventh Amendment challenge to CFTC’s Reparations Program and holding “that the [S]eventh [A]mendment does not require jury trial upon demand in reparation proceedings before the CFTC”), Jager improperly commenced his action in the *district* court rather than the *Court of Appeals*. *See* 7 U.S.C. § 18(e).

Jager’s claim that sovereign immunity is inapplicable based on the Administrative Procedure Act, 5 U.S.C. § 702 is misguided. The Administrative Procedure Act’s definitions provide that the Administrative Procedure Act “applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). In this case, the applicable statute, 7 U.S.C. § 18(b), delegated to the CFTC the power to determine if reparations proceedings are subject to judicial review, and the CFTC elected to make its voluntary decisional proceeding not subject to judicial review, 17 C.F.R. § 12.106(d). Therefore, the Administrative Procedure Act is inapplicable. Although *Clark v. CFTC*, 170 F.3d 110 (2d Cir. 1999), held that the Administrative Procedure Act did allow judicial review of a CFTC proceeding, the proceeding at issue in that case was a “disciplinary proceeding” under 7 U.S.C.

§ 12c(c), which expressly provides that CFTC *disciplinary* actions are “[s]ubject to judicial review.” However, Jager’s CFTC’s proceeding was a reparation proceeding, rather than a disciplinary proceeding, and it was subject to 7 U.S.C. § 18, rather than 7 U.S.C. § 12.

Accordingly, the district court correctly concluded that the CFTC is entitled to sovereign immunity.<sup>1</sup>

### III. Service of Process

Alternatively, the Court can affirm the dismissal as to the CFTC for failure to effect service of process. Fed. R. Civ. P. 4(i)(2) provides that in order “[t]o serve a United States agency . . . , a party must serve the United States and also send a copy of the summons . . . to the agency.” To serve the United States, a party must serve “the United States attorney for the district where the action is brought” and “the Attorney General of the United States at Washington, D.C.” Fed. R. Civ. P. 4(i)(1)(A)–(B). Further, Fed. R. Civ. P. 4(m) provides that “[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.”

Here, Jager requested a summons for the “COMMODITY FUTURES TRADING COMMISSION REPARATIONS PROGRAM,” ROA doc. 5, the district court ordered service on the same, ROA doc. 7, the issued summons reflected the same, ROA doc. 9, and Jager’s affidavit of service reflected that he sent the summons to the CFTC in Washington, D.C., and “to the Office of the Attorney General (OAG) for the District of Columbia,” ROA doc. 11 at 1. Accordingly, Jager did not serve the “the United States attorney for the district where the action is brought,” i.e.,

<sup>1</sup> In 2018, a panel of the Court sua sponte dismissed an appeal of a district court order that had dismissed an action against the CFTC on sovereign immunity grounds. *See Hotra Suarez v. CFTC*, 2d Cir. 18-1511, doc. 54 (Mot. Or.), S.D.N.Y. 18-cv-2983, doc. 5 (Or.).

the U.S. attorney for the Southern District of New York, or the *U.S. Attorney General*. Rather, he served the Attorney General for the District of Columbia, which is a different entity. Fed. R. Civ. P. 4(i)(1)–(2). Since Jager filed his action on May 11, 2021, ROA doc. 1, he had 90 days, until August 9, 2021, to complete service of process on the CFTC. *See* Fed. R. Civ. P. 4(m). Having failed to do so, the district court was required to dismiss the action against the CFTC. *See id.*

#### IV. Personal Jurisdiction

The district court correctly determined that NAB was not subject to personal jurisdiction in New York. To exercise personal jurisdiction “over a person or an organization, such as a bank, that person or entity must have sufficient ‘minimum contacts’ with the forum ‘such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”” *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134 (2d Cir. 2014) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Federal courts may assert personal jurisdiction under two theories: general jurisdiction or specific jurisdiction. *Id.*

##### A. General Jurisdiction

A corporation is subject to general jurisdiction in the place where it is rendered “at home,” i.e., its place of incorporation and its principal place of business. *Daimler AG v. Bauman*, 571 U.S. 117, 122, 137 (2014). A corporation’s principal place of business is its “nerve center,” i.e., “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities,” which “should normally be the place where the corporation maintains its headquarters.” *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010).

NAB is incorporated in Vienna, Austria, *see* ROA doc. 26 (Decla.) at 2, and its headquarters, the place where its officers direct, control, and coordinate its activities, is also in Vienna, Austria, *see id.*; ROA doc. 26 at 7. Although NAB maintains an office in New York City,

the New York City office is not NAB's principal place of business. *See* ROA doc. 26 at 2. Therefore, NAB is not subject to general jurisdiction in New York. *Daimler*, 571 U.S. at 137.

#### B. Specific Jurisdiction

Specific jurisdiction “permits adjudicatory authority only over issues that ‘arise out of or relate to the entity’s contacts with the forum.’” *Gucci*, 768 F.3d at 134 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Jager has not alleged any conduct arising out of New York. *See generally* ROA doc. 1. In fact, Jager identified “Miami, Florida” as the “[p]lace[] of occurrence.” *Id.* at 5. Accordingly, the district court correctly dismissed the action, as to NAB, for lack of personal jurisdiction.

#### V. **Dismissal Should Have Been Without Prejudice**

The district court did not clarify if its dismissal of Jager’s claims was without prejudice. *See* ROA docs. 31, 32. A dismissal for lack of subject matter jurisdiction is a dismissal without prejudice. *See SM Kids, LLC v. Google LLC*, 963 F.3d 206, 212 n.2 (2d Cir. 2020) (explaining that “[w]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice” (quoting *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999))); *see, e.g., Shields v. United States*, 858 F. App’x 427, 428–29 (2d Cir. 2021) (Summary Order) (affirming a dismissal for lack of subject matter jurisdiction predicated on sovereign immunity and remanding for entry of an amended judgment dismissing the case without prejudice); *Leytman v. United States*, 832 F. App’x 720, 721–22 (2d Cir. 2020) (Summary Order) (same). Additionally, a dismissal for want of personal jurisdiction is also a dismissal without prejudice. *See Elfenbein v. Gulf & W. Indus., Inc.*, 590 F.2d 445, 449 (2d Cir. 1978) (per curiam) (observing that whether a dismissal is with or without prejudice refers to the “[r]es judicata effect of a dismissal”), *overruled on other grounds by Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229,

236 (2d Cir. 2015); *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968) (explaining that “at common law, a dismissal on a ground which did not resolve the substantive merit of the complaint was not a bar to a subsequent action on the same claim” and that “a dismissal for lack of jurisdiction or for improper venue” is not an adjudication on the merits); *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 221 (2d Cir. 1963) (“A dismissal for lack of jurisdiction or improper venue does not preclude a subsequent action in an appropriate forum, whereas a dismissal for failure to state a claim upon which relief can be granted is with prejudice.”); *see also Smith v. United States*, 554 F. App’x 30, 32 n.2 (2d Cir. 2013) (Summary Order) (“[A] dismissal for want of personal jurisdiction is without prejudice.” (citing *Elfenbein*, 590 F.2d at 449)).

Accordingly, the Court should remand with instructions to the district court to amend the judgment to clarify that the dismissal was without prejudice.

### **Conclusion**

For the foregoing reasons, the Court should affirm the judgment but remand with instructions that the district court amend its judgment to reflect that the dismissal was without prejudice.

**Applicant Details**

First Name	<b>Bex</b>
Last Name	<b>Rothenberg-Montz</b>
Citizenship Status	<b>U. S. Citizen</b>
Email Address	<a href="mailto:bm3084@nyu.edu">bm3084@nyu.edu</a>
Address	<div> <b>Address</b>  <b>Street</b>  <b>18 6th Ave, Apt 3410</b>  <b>City</b>  <b>Brooklyn</b>  <b>State/Territory</b>  <b>New York</b>  <b>Zip</b>  <b>11217</b>  <b>Country</b>  <b>United States</b> </div>
Contact Phone Number	<b>(415) 933-0463</b>

**Applicant Education**

BA/BS From	<b>Columbia University</b>
Date of BA/BS	<b>February 2020</b>
JD/LLB From	<b>New York University School of Law</b>
	<a href="https://www.law.nyu.edu">https://www.law.nyu.edu</a>
Date of JD/LLB	<b>May 18, 2023</b>
Class Rank	<b>School does not rank</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>NYU Moot Court Board</b>
Moot Court Experience	<b>Yes</b>
Moot Court Name(s)	<b>NYU Moot Court Board</b>

**Bar Admission****Prior Judicial Experience**

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Murphy, Erin  
erin.murphy@nyu.edu  
(212) 998-6672  
Kenji Yoshino, David Glasgow and  
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Glasgow: 212 998 6018  
Sexton, John  
john.sexton@nyu.edu  
212-992-8040

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Bex Rothenberg-Montz  
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The Honorable Nina Morrison  
United States District Court  
Eastern District of New York  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 605N  
Brooklyn, NY 11201-1818

Dear Judge Morrison,

I am writing to apply for a clerkship in your chambers for the 2025 term or any subsequent term. I am a recent graduate of New York University School of Law where I was the Editor in Chief of the journal and moot court team, Moot Court Board. Following graduation, I will complete a two-year Skadden Fellowship at Housing Works in New York, working on both impact litigation and direct services. I spoke with your clerk, Brian Cross, about clerkship opportunities in New York; he expressed enthusiasm for your mentorship and the rigor with which you approach your work and recommended I apply. Additionally, I am applying because I greatly respect your work at the Innocence Project and share your dedication to civil rights.

My resume, unofficial transcript, and writing sample are submitted with this application. My recommenders are NYU Professors Kenji Yoshino (212-998-6421) and David Glasgow (212-998-6018), John Sexton (212-505-1258 [home], 917-468-9695 [assistant]), and Erin Murphy (212-998-6672). I was a Research Assistant for Professors Yoshino and Glasgow. I was a Teaching Assistant for Professor Sexton, and he was my professor for Civil Procedure and Religion and the First Amendment. Professor Erin Murphy was my evidence professor. New York University will submit my recommendations separately.

I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,  
/s/  
Bex Rothenberg-Montz

## BEX ROTHENBERG-MONTZ

18 6th Ave, Apartment 3410; Brooklyn, NY 11217  
(415) 933-0463    bm3084@nyu.edu

### EDUCATION

#### NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Juris Doctor, May 2023

Honors: Mark Brisman Prize, for the most significant contribution to the Moot Court Board

Member of the Order of the Barristers

Moot Court Board (Journal Equivalent), Editor-in-Chief

Activities: TA for Supreme Court and the Religion Clauses, Professor John Sexton

TA for Civil Procedure, Professor Jonah Gelbach

Research Assistant, Professor Kenji Yoshino & David Glasgow

OUTLaw, TGNCI Board Chair

American Constitution Society, Litigation Advocacy Chair

Publication: Undo Deference: Reversing the Erosion of Public Employees' Free Speech Rights,  
*N.Y.U. Proceedings* (Sept. 20, 2022)

#### COLUMBIA UNIVERSITY, SCHOOL OF GENERAL STUDIES, New York, NY

Bachelor of Arts in Psychology, *summa cum laude*, February 2020

Honors: Honors Society, Phi Beta Kappa & Jennifer A. Pack Prize in psychology

Activities: Laboratory for Intergroup Relations and the Social Mind, Professor Valerie Purdie-Greenaway,  
Lab Manager & Research Assistant

### EXPERIENCE

#### HOUSING WORKS, New York, NY

*Skadden Fellow*, September 2023 – August 2025

#### CIVIL RIGHTS AND RACIAL JUSTICE CLINIC, New York, NY

*Legal Intern*, January 2023 – June 2023

Investigated illegal police conduct and treatment of youth in psychiatric facilities, including conducting interviews, performing research, and developing an advocacy plan. Represented a community in a FHWA Title VI investigation, including interviewing community members, research, and writing legal memos to investigators.

#### DEPARTMENT OF JUSTICE - CIVIL RIGHTS DEPARTMENT, Washington, DC

*Housing and Civil Enforcement Intern*, May 2022 – August 2022

Researched and drafted prelitigation memo and complaint for an FHA and ADA claim. Drafted request for admission for a Servicemembers Civil Relief Act claim. Researched and wrote internal guides to the Low-Income Housing Tax Credit and disparate impact claims under the FHA.

#### IDENTITY DOCUMENTS PROJECT, New York, NY

*President and Board Chair*, August 2021 – May 2023; *Advocate*, August 2020 – May 2023

Represented clients seeking legal name and gender changes to update government-issued identity documents. Planned and led advocate training, updated advocate resources, and maintained tax-exempt status.

#### CIVIL LITIGATION EXTERNSHIP - SOUTHERN DISTRICT OF NEW YORK, New York, NY

*Extern*, September – December 2021

Completed legal research for claims under ADA, Title VII, and the False Claims Act. Drafted victims' funds distribution order and letter under ADA, and notifications and orders for enforcement actions under the Clean Water Act. Drafted a reply brief for a motion for summary judgment claiming a Fourth Amendment violation.

#### CENTER FOR DEMOCRACY AND TECHNOLOGY, New York, NY

*Legal Intern for Equity in Civic Technology Team*, June – August 2021

Analyzed educational agencies' privacy policies and American Rescue Plan applications for legislative compliance and civil rights violations, then drafted reports recommending compliance changes. Researched educational community engagement legislation, then created blog post and presentation for community stakeholders.

### ADDITIONAL EXPERIENCE

Past experience as Hotline Operator at Trans Lifeline (Feb. 2020-Aug. 2021), Administrative Assistant at NYC Health and Hospitals (Mar.-Aug. 2020) and Youth in Out of Home Care Intern at Lambda Legal (Sept.-Dec. 2019).

Name: Bex Rothenberg-Montz  
 Print Date: 04/07/2023  
 Student ID: N18313049  
 Institution ID: 002785  
 Page: 1 of 1

New York University  
 Beginning of School of Law Record

Cumulative

44.0 44.0

Spring 2022

School of Law  
 Juris Doctor  
 Major: Law

Advanced Administrative Law	LAW-LW 10090	2.0	A-
Instructor: Sally Katzen Dyk			
Torts:Products Liability	LAW-LW 11140	3.0	A
Instructor: Mark A Geistfeld			
Property	LAW-LW 11783	4.0	A-
Instructor: Frank K Upham			
Science and the Courts	LAW-LW 12668	2.0	B+
Instructor: Jed S Rakoff			
Science and the Courts Seminar: Writing Credit	LAW-LW 12801	1.0	A
Instructor: Jed S Rakoff			

AHRS EHRS  
 Current 12.0 12.0  
 Cumulative 56.0 56.0

Fall 2022

School of Law  
 Juris Doctor  
 Major: Law

American Legal History: The First Developing Nation?	LAW-LW 10820	4.0	A-
Instructor: Daniel Hulsebosch			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+
Instructor: Geoffrey P Miller			
Moot Court Board	LAW-LW 11553	1.0	CR
Evidence	LAW-LW 11607	4.0	A
Instructor: Erin Murphy			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Kenji Yoshino			
Theories of Discrimination Law Seminar	LAW-LW 12699	2.0	A
Instructor: Sophia Moreau			

AHRS EHRS  
 Current 14.0 14.0  
 Cumulative 70.0 70.0

Spring 2023

School of Law  
 Juris Doctor  
 Major: Law

Civil Rights Clinic Seminar	LAW-LW 10559	4.0	***
Instructor: Deborah Archer			
Civil Rights Clinic	LAW-LW 10627	3.0	***
Instructor: Deborah Archer			
Moot Court Board	LAW-LW 11553	1.0	***
Decisionmaking in the Federal Courts	LAW-LW 11836	4.0	***
Instructor: Harry T Edwards			
Research Assistant	LAW-LW 12589	1.0	***
Instructor: Kenji Yoshino			

AHRS EHRS  
 Current 13.0 0.0  
 Cumulative 83.0 70.0

Staff Editor - Moot Court 2021-2022  
 Editor-in-Chief - Moot Court 2022-2023

End of School of Law Record

Fall 2020

School of Law				
Juris Doctor				
Major: Law				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor: Edith Beerdsen				
Criminal Law		LAW-LW 11147	4.0	A-
Instructor: Rachel E Barkow				
Procedure		LAW-LW 11650	5.0	B+
Instructor: John Sexton				
Contracts		LAW-LW 11672	4.0	A-
Instructor: Clayton P Gillette				
1L Reading Group		LAW-LW 12339	0.0	CR
Topic: Race and the Warren Court - Ho				
Instructor: Martin Guggenheim				

AHRS EHRS  
 Current 15.5 15.5  
 Cumulative 15.5 15.5

Spring 2021

School of Law				
Juris Doctor				
Major: Law				
Constitutional Law		LAW-LW 10598	4.0	B+
Instructor: Daryl J Levinson				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor: Edith Beerdsen				
Legislation and the Regulatory State		LAW-LW 10925	4.0	B
Instructor: Roderick M Hills				
Torts		LAW-LW 11275	4.0	A-
Instructor: Barry E Adler				
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor: Martin Guggenheim				
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR

AHRS EHRS  
 Current 14.5 14.5  
 Cumulative 30.0 30.0

Fall 2021

School of Law				
Juris Doctor				
Major: Law				
Criminal Procedure: Fourth and Fifth Amendments		LAW-LW 10395	4.0	A-
Instructor: Andrew Weissmann				
Orison S. Marden Moot Court Competition		LAW-LW 11554	1.0	CR
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor: Jonah B Gelbach				
Government Civil Litigation Externship-Southern District		LAW-LW 11701	3.0	A-
Instructor: David Joseph Kennedy				
Monica Pilar Folch				
Government Civil Litigation Externship - Southern District Seminar		LAW-LW 11895	2.0	A
Instructor: David Joseph Kennedy				
Monica Pilar Folch				
Religion and the First Amendment		LAW-LW 12135	2.0	A
Instructor: Schneur Z Rothschild				
John Sexton				

AHRS EHRS  
 Current 14.0 14.0

**TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW  
JD CLASS OF 2023 AND LATER & LLM STUDENTS**

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

**Grading Guidelines**

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

<b>First-Year JD (Mandatory)</b>	<b>All other JD and LLM (Non-Mandatory)</b>
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
<b>Maximum for A tier = 31%</b>	<b>Maximum for A tier = 31%</b>
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
<b>Maximum grades above B = 57%</b>	<b>Maximum grades above B = 57%</b>
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

**Important Notes**

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

#### Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

#### Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

**Updated: 10/4/2021**

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June 02, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

RE: BEX ROTHENBERG-MONTZ

Dear Judge Matsumoto:

It is with utmost enthusiasm and confidence that I write to recommend Bex Montz for a clerkship in your chambers. Bex is smart, hard-working, and thorough, and he will make an exceptional law clerk.

I met Bex this fall when he was a student in my 100+ person Evidence class. He sat right in the front row, so I often chatted with him before and after class, and he also regularly participated in our classroom discussions (as well as our classroom cold calls!). From the earliest days, Bex stood out as deeply engaged in the course, and thrived on its intellectual rigor. He prepared thoroughly for each class (not always typical for third year students) and asked sophisticated, thoughtful questions. I was not at all surprised to see that he earned one of only a dozen As on the exam – which is a much-feared multiple choice, closed book, time-pressured exam modeled after the Bar. Bex's strong academic transcript is further testament to his formidable analytical and intellectual skills.

Bex's interest in mastering the law of evidence no doubt stems in part from his determination to pursue a career as a litigator, and in particular as a civil rights attorney. As a participant in our civil rights clinic, Bex gained experience conducting research and drafting memos in support of a civil claims. He has further served in numerous leadership roles on campus, including as the Editor-in-Chief of the Moot Court Board, which also entails overseeing Proceedings, the Board's online journal. Bex also managed to find time to serve as the President and Board Chief of the Identity Documents Project, and in leadership roles with OUTLaw and the American Constitution Society. I can see why he so often is chosen as a leader by his peers – he is open-minded, generous, and considerate, while also being organized and diligent. I always enjoyed our conversations, whether about evidence or the latest news.

Bex recently received the honor of being named a Skadden Fellow, working with Housing Works in New York on issues related to income discrimination and housing. It is wonderful to know that someone with his talents and capabilities intends to use those skills to the public benefit.

Bex has focused his clerkship search on the tri-state area, given that his wife's work and family are here. I am confident he will make a superb law clerk, and highly commend his application to your consideration.

Sincerely,

Erin E. Murphy  
Norman Dorsen Professor of Civil Liberties

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**Meltzer Center**  
for Diversity, Inclusion,  
and Belonging  
NYU School of Law

May 18, 2023

**RE: Bex Montz, NYU Law '23**

Your Honor:

It is our great pleasure to recommend Bex Montz, a recent graduate of NYU School of Law, for a clerkship in your chambers.

We lead a research center at NYU School of Law focused on advancing interdisciplinary research on issues of diversity, equity, and inclusion (DEI). Bex worked with us as a research assistant in fall 2022 and spring 2023 on a project relating to the growing cultural and legal backlash against DEI. Specifically, he analyzed the common critique that DEI undermines the self-conception of historically dominant group members, such as by making students feel ashamed of our nation's racial history or by causing men to feel adrift and unsure of their role in contemporary society.

Bex's research culminated in a 10,000-word memo exploring the variety of claims made by opponents in this area, canvassing prominent examples of such arguments in media and politics, and analyzing the veracity of the claims. He argued, based on extensive social science research, that DEI efforts can indeed trigger negative emotions—such as low self-esteem, guilt, or anxiety—for people who belong to dominant social groups. He then considered multiple proposed solutions, such as teaching individuals to cultivate a looser attachment to their own identities, giving them the tools to affirm their own identities, and constructing healthier narratives of masculinity. The memo was lucid, rigorous, and nuanced.

What most stood out about Bex's analysis was its assiduously fair presentation of the arguments on both sides of these debates—an impressive feat given the heated and polarized subject matter. He rejected simplistic arguments made by both proponents and opponents of DEI, and spent the vast bulk of his memo delving into the nuances in the middle, relying heavily on findings in social psychology on concepts such as “social identity threat” and “collective angst.” His willingness to critique claims on all sides of a debate, and his commitment to rigorous and evidence-based argumentation, will serve him well during a clerkship.

Just as impressive is Bex's openness and responsiveness to feedback. Throughout his work with us, he actively invited constructive feedback on his research direction and analysis, and submitted an initial draft of his memo in fall 2022 for critique. We expressed skepticism regarding one of the arguments he made in his memo and asked him to elaborate in a revised draft. We also flagged several areas for further analysis, such as by requesting a deeper

Bex Montz, NYU Law '23  
May 18, 2023  
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exploration of arguments made by the scholar Richard Reeves in his book *Of Boys and Men*. Bex returned an excellent redraft, twice as long as the original, which thoroughly addressed all our questions and concerns.

Finally, Bex has been an active and engaged citizen of NYU School of Law, particularly in public interest activities. He served as Advocate and Board Chair of the Identity Documents Project (a non-profit organization serving transgender, gender non-conforming, and intersex (TGNCI) individuals), Litigation Advocacy Chair of the American Constitution Society, TGNCI Board Chair of the LGBTQ student group OUTLaw, and Editor-in-Chief of the Moot Court Board. He intends to put his passion for public interest law into practice by honing his litigation skills and pursuing a career in civil rights and poverty law. He has won the prestigious Skadden Fellowship in recognition of his great promise and achievements in this domain.

Bex was an indispensable member of our research team with a commendable mix of strong research and writing abilities, analytic rigor, and interpersonal warmth. We often say in our work that we most admire people who have soft hearts and hard heads. Bex is such a person. We strongly recommend him to your chambers.

If we can be of any further assistance, please contact us at the telephone numbers or email addresses below.

Sincerely,



Kenji Yoshino  
Chief Justice Earl Warren Professor of  
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June 02, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am delighted to write in support of the candidacy of Bex Montz for a clerkship in your chambers.

Bex was assigned to my 1L Civil Procedure section in Fall Term 2020, what must be among the most challenging academic terms in decades. Specifically, in order to comply with Covid health and safety guidelines while still providing some in-person interaction between student and professor, in Fall Term 2020 NYU Law School employed a hybrid teaching method, whereby one-third of the students in each 1L section were in person while the remaining two-thirds participated remotely. The groups rotated each class meeting so students had an equal number of in-person and remote experiences. To provide an even greater challenge, a faculty colleague teaching another Civil Procedure section sustained a serious injury and was unable to continue teaching, so relatively early in the Fall Term, my faculty colleague's Civil Procedure section was folded into mine. It was in this difficult, hybrid and disrupted learning environment that I came to know Bex.

In spite of this, Bex quickly emerged as an active and engaged learner, not only in the class discussions but also among his student colleagues. He consistently was prepared for class (he was "on call" no fewer than three times during the term), and he participated fully in remote office hours and other opportunities in order to engage more fully not only with me and with his Teaching Assistants but also with his colleagues in class and the broader law school community generally. In fact, each year my current team of Teaching Assistants recommends to me the Teaching Assistants for the following semester, and they highly recommended Bex as a Teaching Assistant for Civil Procedure in Fall Term 2021. Unfortunately, we did not have the opportunity to work together in Civil Procedure: the Law School was hosting a faculty visitor, and I volunteered to step aside so the visitor could teach Civil Procedure.

Also in Fall Term 2021, Bex enrolled in an advanced seminar I teach on the Relationship of Government and Religion. Focusing on sixteen words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...", the seminar uses as its course material in excess of 2,000 pages of unedited United States Supreme Court opinions. In the first half of the term we investigate the Establishment Clause, while in the second half we examine the Free Exercise clause. Bex brought the same enthusiasm and engagement to this small group seminar that was evident in Civil Procedure. He demonstrated an exceptional ability to analyze the cases and to present thoughtful arguments and analyses in our class discussions. Indeed, his final paper on *Maricopa County Community College District v. Emily Thoms, et al.* demonstrated his understanding of the nuances inherent in the litigation which grew from Covid mandates and restrictions.

Because we were unable to work together in Civil Procedure, I offered Bex the opportunity to work with me as a Teaching Assistant for an honors freshman seminar I teach, which is based on the law school seminar in Government and Religion in which he was enrolled. While it is an undergraduate freshman seminar, it nevertheless is taught as a graduate seminar (it once was described as "not for the fainthearted"), using the same unedited Supreme Court opinions I use for the Law School seminar; however, the formative philosophy of this undergraduate course is less about the actual material studied and more about the acquisition of the skills necessary to read, write, and think critically. I work very closely with the students in each of my courses as well as with the Teaching Assistants; Bex immediately embraced this philosophy and quickly immersed himself in the coursework and in his work with the students. His tireless energy, his patience, and his great facility for working with less experienced students made him a tremendous asset to the teaching team. Bex consistently was dedicated to his work with the students; beyond leading small-group discussions, I know he made the time to meet individually with students in the evenings and on weekends. During our work together, I observed Bex to be extremely motivated to succeed in his own work, and to do all within his power to help those around him succeed in theirs.

I quickly came to understand that the dedication and commitment Bex demonstrated to the students and the course material is evident across his entire law school experience. His broad experience is outlined on his resume. However, I know personally that in addition to his sterling academic record and his work as both a Research Assistant and a Teaching Assistant, Bex also served as the Moot Court team as Editor-in-Chief and served as the Board Chair for such organizations as the Identity Documents Project and OUTLAW and as Litigation Advocacy Chair for the American Constitutional Society.

In short, I have observed Bex in his various roles as a student in two different class environments, as a Teaching Assistant, and as a member of the NYU Law School community. In each of these roles and in each of these environments, Bex is outstanding: by any measure, he is a person of substance. He is dedicated to the law and legal scholarship, he is committed to conveying knowledge, and he remains deeply engaged with the many communities in which he is involved. Finally, and perhaps among his most important qualities (but one which is difficult to convey), Bex has a positive and affable nature and is someone with whom it is a pleasure to spend time.

I am confident Bex will bring these same qualities to whatever endeavor he lends his considerable talents, and it is my pleasure to write in support of his candidacy.

Sincerely,  
John Sexton

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**Bex Rothenberg-Montz Writing Sample**

This brief was written for a constitutional law competition as a member of NYU's Moot Court Board. I was assigned to argue the government did not violate the First Amendment when it terminated a public employee in retaliation for her speech. The brief originally addressed two questions of law. I have omitted one question, its corresponding facts, and the entire summary of the argument. We were instructed to ignore any procedural defects in the claims. No one has provided edits or feedback on this brief.

**STATEMENT OF FACTS**

On February 6, 2019, Robin Blake ("Blake") vented about her personal gripes with her employer, the Washburn Metropolitan Police Department ("the Department"), after a meeting of the Washburn Winter Parking Committee ("the Committee"). R. at 8. Blake's supervisor and fellow Committee member, Clark Samson ("Samson"), had suggested that the Committee meeting end early, preventing Blake from making her weekly presentation. *Id.* at 9. In response, Blake implied that two of her co-workers and fellow Committee members, Jed Buchanan ("Buchanan") and Nate Wilder ("Wilder") were unfit for their jobs, complained about her coworkers' interest in sports and beer, and lamented the Department's lack of gender diversity. *Id.*

In the month following Blake's outburst, Buchanan and Wilder felt uncomfortable speaking to Blake and avoided interactions with her. *Id.* In one instance, Wilder called for backup when answering a 911 call involving a firearm. *Id.* Blake and another officer, Dixon, answered the call. *Id.* While deescalating the situation, Wilder felt he could not rely on Blake and communicated only with Dixon. *Id.* After this incident, Wilder requested a change in his patrol route to avoid working with Blake. *Id.* at 10. In response to these disruptions in office functioning, Samson fired Blake. *Id.*

Blake brought a claim under 42 U.S.C. § 1983, alleging the City of Washburn engaged in retaliatory termination in violation of her First Amendment rights. Blake moved for summary judgment. The District Court for the Western District of Bascom granted Blake's motion. The